(26,007)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 540.

LEHIGH COAL & NAVIGATION COMPANY

vs.

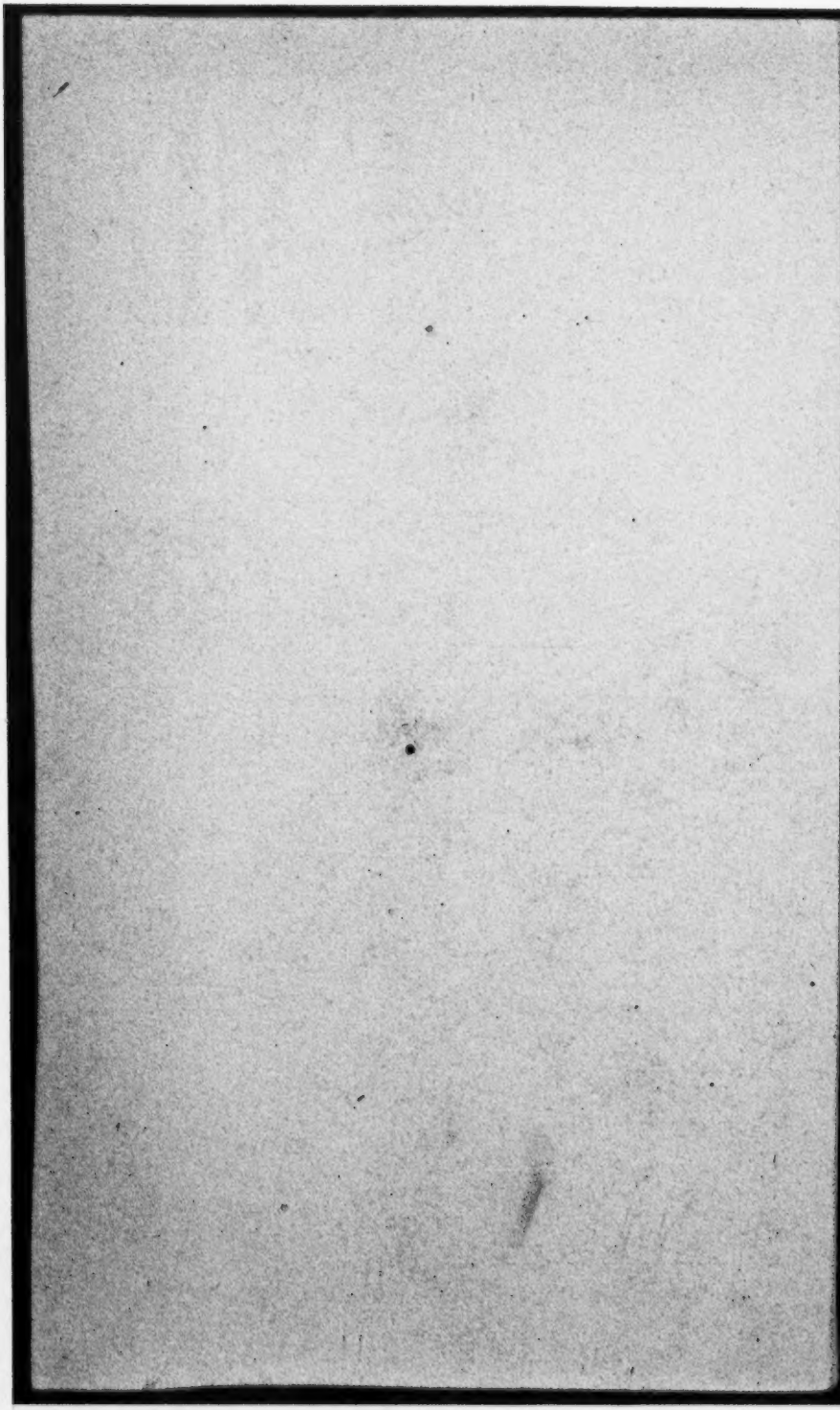
THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

	Original.	Print
Certificate from the United States circuit court of appeals for the third circuit	1	1
Statement	1	1
Diagram	3	2
Questions certified	8	5
Appendix—Sample tariff, I. C. C. A. No. 289	9	6
Map showing railroads and branches	11	6
Clerk's certificate	12	7

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 26, 1917.



1 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1916.

No. 2136.

LEHIGH COAL & NAVIGATION COMPANY

vs.

UNITED STATES, Plaintiff Below.

Error to the District Court of the United States for the District of New Jersey.

Certificate to Supreme Court.

Before Buffington, McPherson, and Woolley, Circuit Judges.

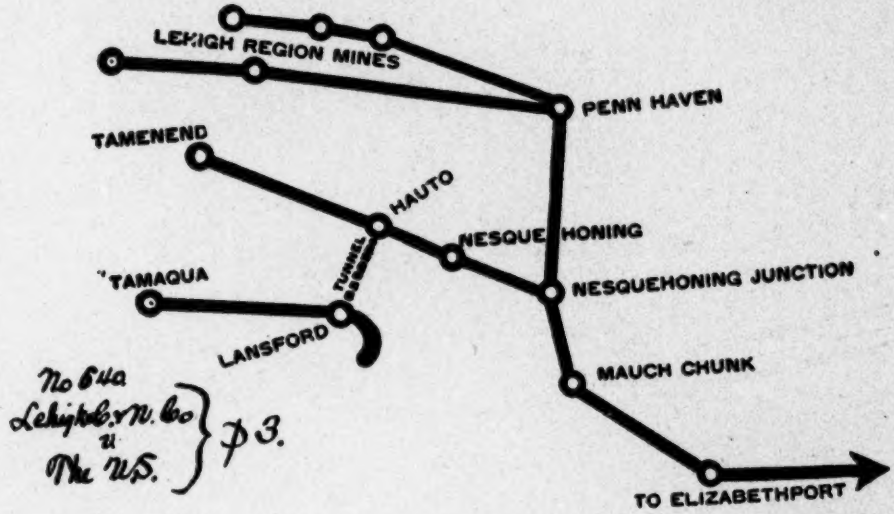
The Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court on certain questions of law, and hereby certifies that the facts upon which they arise are these:

The foundation of the dispute is the 10th covenant of a railroad lease, or contract, between the Lehigh Coal & Navigation Co. as lessor (hereinafter called the Company), and the Central Railroad of New Jersey as lessee (hereinafter called the Central Railroad). In order to understand the situation, a preliminary statement in some detail is necessary: The Company, which is a miner and shipper of anthracite coal, was indicted, convicted, and fined, in the District
2 Court for the District of New Jersey for accepting rebates and concessions from the Central Railroad in violation of the Elkins Act as amended in 1906; 38 Stat. 584. Each count of the indictment charged a separate offense substantially as follows: As a part of its interstate business, the Central Railroad carries anthracite coal in carload lots. Being subject to the Acts to Regulate Commerce, it filed tariffs and schedules with the Commission, showing its rates and charges for such carriage from the Pennsylvania field to points in New Jersey. During the period covered by the indictment—1912, 1913, 1914, and part of 1915—these tariffs were in force, and under them the Company shipped the carload described in the count from Nesquehoning Colliery in Pennsylvania to a specified point in New Jersey. The rate named in the tariff thus became due and payable, but afterward the Company unlawfully and knowingly accepted a portion of such rate from the Central Railroad, so that the coal was carried at less than the rate, and the Company thus received the advantage of an illegal rebate. The indictment did not charge discrimination. The Company pleaded not guilty, and the case went to trial. The following facts appeared without dispute:

In March, 1871, the Company owned and operated the Lehigh & Susquehanna Railroad, (not a separate corporation), a line run-

ning up the Lehigh river from Easton to Wilkes-Barre. The Company itself had built and was operating this line under special legislative authority giving it the powers of a common carrier thereon. It also owned the stock and was the lessee of the Nesquehoning Valley Railroad, a separate corporation, whose line ran from Nesquehoning Junction (a short distance above Mauch Chunk) westward to Tamanend. About half way along this road is Hauto, and at this point a tunnel was being built in 1871 to connect at Lans-
3 ford with the tracks in the Panther Creek valley south of Nesquehoning. These tracks belonged to the Company, and their principal, if not their only, purpose was to serve its mines in that valley. Between Hauto and the Junction was the Company's Nesquehoning colliery, connected with the Nesquehoning railroad. These mines—at Nesquehoning and in the Panther valley—were and still are the nearest mines to New York bay, and they were the only mines at Nesquehoning or in the neighborhood of Hauto. Farther north in the Lehigh region were mines of other operators, and these were more distant from tide by, say, 10 to 40 miles. These other mines were reached by lateral roads that connected with the Lehigh and Susquehanna line at Penn Haven, several miles north of Mauch Chunk. At Penn Haven these lateral roads had an additional connection—with the Lehigh Valley Railroad, a separate carrier. The accompanying sketch will make the topography more plain.

(Here follows diagram marked p. 3.)



No 64a
Lehigh V. N. Co
v
The U.S.
$3.

(We also append a map containing further details.)

In March, 1871 the Company faced the following situation: Its prosperity depended in large measure on the revenue from its Lehigh and Susquehanna line, and this revenue in turn depended on the thru connections of the line at Easton on the Delaware river, the southern terminus. The value of these thru connections was threatened by certain arrangements among the connecting carriers, and mainly for this reason the Company's management decided to lease its railroad properties to one of the connecting carriers, namely, the Central Railroad. Accordingly they made the lease or contract of March 31, 1871, whose 10th covenant has given rise to the present controversy. To understand the covenant properly, other facts should be stated: Before the lease, the Company operated its own line (the Lehigh & Susquehanna) and carried its own coal thereon. Naturally, in leasing the line, it took into account the advantageous nearness of its mines to tide, and sought to insure favorable rates for the coal from these collieries. More precisely, the situation was this: Referring to the preceding sketch; if Hauto be taken as the end of the western arm of a Y, and Penn Haven as the end of the northern arm—both arms springing from Nesquehoning Junction—the arms will be found of nearly equal length; so that Hauto and Penn Haven are similarly placed for shipments to tide, each being 118 miles from the Bay—Nesquehoning colliery being a few miles nearer.

At that time, rates were calculated from Penn Haven as a base, or from Mauch Chunk as another base. The mines of the other operators that lay northward in the Lehigh region paid three rates, (1), a local or lateral charge to Penn Haven, (2), a charge from that point to Mauch Chunk, and (3), a charge from Mauch Chunk to tide. The charge from Penn Haven to Mauch Chunk had always been the same as the charge from the Company's mines to Mauch Chunk. But the lateral charges to Penn Haven from the mines of the other operators that lay northward of that point had varied from 28 to 72 cents, according to distance. The rate from Hauto to tide was the same as the rate from Penn Haven to tide—this of course being less than the rate from the mines north of Penn Haven, since these mines had to pay a lateral charge to Penn Haven. Nesquehoning colliery had the further advantage of a few miles over Hauto. This situation the 10th covenant was intended to preserve. As one consideration of the lease, the covenant put the Company's coal from Hauto and Nesquehoning on a different footing from the coal of the other Lehigh miners in the north, because the other miners were obliged to get their coal to Penn Haven and to pay the local or lateral rate to that point. The covenant provides, that—

"* * * on coal delivered for transportation by (the Company) on sidings at the northern end of the Nesquehoning tunnel, the rates of transportation shall not exceed the rates charged at the same time from Penn Haven to the same points on coal from the Lehigh region, either by the (Central Railroad) or by the Lehigh Valley Railroad Company."

Hauto

About 1878, the method of fixing rates was changed. Penn Haven and Mauch Chunk were no longer used as basing points, and the same rates were fixed for all the mines in the Lehigh region. But, in pursuance of the 10th covenant, the rate to be charged the Company was fixed at 86 per cent. of the rate charged to the other mines in the Lehigh region—the reason being that the distance to tide from Penn Haven, from Hauto, or from Nesquehoning, was 86 per cent. of the average distance from the other mines to the north. While this arrangement was in force, the Company paid a net rate calculated on the basis of 86 per cent. After 1887, the date of the first Act to Regulate Commerce, this method of settlement was changed, and the Company paid, or was charged, the full tariff rate charged to the other Lehigh mines, but was repaid, or was credited with, 14 per cent. thereof—this being done under the obligation, or the supposed obligation, of the 10th covenant. Between 1887 and August, 1906, when the Hepburn Act went into effect, this arrangement for repayment did not appear in the traiffs filed by the Central Railroad with the Commission. But in Au-
6 gust, 1906, and thereafter, the tariffs contained a foot-note in the following form:

"(4) In compliance with the Tenth Covenant of the lease from the Lehigh Coal & Navigation Company under which the Central Railroad Company of New Jersey operates the Lehigh and Susquehanna Railroad, a lateral allowance is made out of herein-named rates to the Lehigh Coal and Navigation Company on all Anthracite coal originating on the latter's tracks in the Panther Creek, Nesquehoning, and Hacklebarnie, Districts mined and shipped by it, when coming via the Hauto, Nesquehoning, and Mauch Chunk gateways.

"The Covenant referred to is set forth in the lease of March 31, 1871, and recorded in Deed Book No. 262, Page 480, of Luzerne County, and Deed Book, No. 43, Page 339, of Lackawanna County, Pennsylvania."

(See sample tariff appended hereto.)

This foot-note is connected by the numeral (4) with the rate of $1.55 specified in the tariff as the rate from Hauto and Nesquehoning to Elizabethport, N. J.; but the foot-note does not state how much the allowance is, nor does it furnish any mathematical basis for calculating the amount. All the anthracite coal tariffs filed with the Commission by the Central Railroad after 1906 (262 in number) contained this foot-note. The allowance was 19.18 cents per ton, and this was credited in the monthly settlement of the Company's account with the Central Railroad, the credit being the point of the government's attack. The verdict covers 27 shipments of coal in prepared sizes from Nesquehoning colliery for re-shipment at Elizabethport. The foregoing facts were either proved or stipulated, and it appeared also without dispute that during the years in question the Company's officers were familiar with the contents of the Central Railroad's tariffs, and knew that the allowance was being made and accepted. One of the Company's defenses was that it had not "knowingly" accepted a rebate within the meaning of the Act—its

contention being, that the allowance had been accepted in good faith, in the honest belief that the payment was justified by the 10th covenant, and also in the honest belief that the allowance was properly and legally noted and provided for in the filed and published tariffs.

7 In support of this defense the Company offered evidence that would support the findings—

(1) That in 1906, at the time the note was made part of the tariffs, the Company's officers were advised by the traffic officials of the Central Railroad, and also by the Railroad's President, by its Vice-President and General Counsel, and by its General Attorney, that the note had been made part of the tariffs in full compliance with the Act of 1906; and were advised also by them that, in view of the note having been made part of the tariffs, the payment and the receipt of the allowance would comply with the tariff and with the law; That the Company's officers trusted and relied upon the judgment of the officers of the Central Railroad.

(2) That between 1906 and the date of the indictment 262 tariffs, all containing the note, had been filed with and accepted by the Commission.

(3) That in 1908 the Company had been informed by the Central Railroad, that the Commission (acting by one of its important officials who was in charge of the subject of tariffs) had specifically approved the form of the tariff containing the note, in spite of the fact that the amount of the allowance had not been specified therein—the Commission having under consideration at the time the question whether the payment and the receipt of the allowance under the tariff and foot-note were proper: That by reason of such information the Company had thereafter honestly believed that the receipt of the allowance was not in violation of the tariff or of the Act, but was in compliance therewith.

(4) That examinations of the Company's books, records, and accounts, were made by the Commission's investigators in 1909, and that by reason of such examinations the Commission had been informed that the Company had received, and was receiving,

8 the allowance, but did not object either to the form or to the substance of the practice.

The Company's evidence concerning good faith was received under the Government's objection, and the government offered evidence in contradiction thereof. At the close of the trial the court struck out all the evidence on this subject from the record, and refused to submit the question of good faith to the jury, holding that the Company's honest belief that the allowance was permitted by the tariffs and the foot-note thereto could not affect the issue, for the reason that the Company knew the contents of the tariffs, and knew also that the allowance was actually made and received.

The questions of law on which we desire instruction are these:

1. In the criminal prosecution of a shipper for knowingly accepting transportation at less than the duly established rate by receiving an allowance that was referred to in the tariff but was not specified in figures therein, has the defendant a right to offer evidence

that the allowance was received under the honest belief that it was lawfully established by the traiff, and under the honest behielf that in receiving it he was not disregarding what he believed to be the provisions of the tariff but was complying therewith?

2. Upon the foregoing facts, and in view of the kind and amount of evidence offered upon the subject of good faith, did the district court err in the present case by refusing to submit the question to the jury?

(Here follow fac-similes and map, marked pages 9, 10, and 11.)

No Supplement to this Tariff will be issued except for the purpose of canceling the Tariff.

I. C. C. A. No. 289.
Cancels I. C. C. A. No. 203.

The Central Railroad Company of New Jersey

LOCAL AND PROPORTIONAL FREIGHT TARIFF

ON

Anthracite Coal, Anthracite Briquettes and Boulets

IN CARLOADS OF NOT LESS THAN 15 GROSS TONS

From Collieries, Washeries and Stations located on

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

TO POINTS ON

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

FOR SHIPMENT BY WATER

AS SHOWN HEREIN

TERMINAL FACILITIES AND DELIVERIES.

The rates named herein apply from and to the tracks, stations or other receiving and delivering points on, or to and from private sidings connected with lines parties to this tariff, where the particular traffic is usually received or delivered; and also include the use of receiving and delivering facilities at such stations or other receiving and delivering points or private sidings, subject, nevertheless, to such charges (if any) for switching, terminal service, and all other charges and any rules and regulations that may in any wise change, affect or determine any part, or the aggregate of such rates as well as any privileges or facilities granted or allowed, as are, or shall be, published by any of the lines parties to this tariff and filed with the Interstate Commerce Commission, and any other charges for strictly local service or regulations incidental thereto, lawfully on file with the Interstate Commerce Commission.

DEMURRAGE AND CAR SERVICE REGULATIONS.

On cars consigned for delivery at Piers covered by this tariff, demurrage will be computed on the "average plan" Rules for computation of time and other conditions governing the average free time, as given in tariff I. C. C. A. No. 212 or Reissues thereof, will apply.

On cars consigned for delivery at Piers covered by this tariff, but afterward reconsigned for local delivery, when freight is to be loaded by consignor or unloaded by consignee, $1.00 per car per day, or fraction thereof, for delay beyond 48 hours in loading and unloading, will be added to the rates named herein and constitute a part of the total charges to be collected by the carrier on the property, except that Car Service Association or local regulations at shipping point or destination lawfully on file with the Interstate Commerce Commission, shall prevail and govern at such points.

RECONSIGNMENT EN-ROUTE.

Note.—Rates for reconsigning while on tracks of the C. R. R. Co. of N. J. (See I. C. C. A. No. 275, or subsequent issues.)

RATES FROM OR TO INTERMEDIATE POINTS.

From any point of origin not named in this tariff, but between any two points of origin named, the commodity rate will be the same as from the next more distant point that is named in this tariff.

By authority of Rule 77 of Interstate Commerce Commission Tariff Circular No. 18-A, this tariff is not made applicable from all intermediate points. Upon reasonable request therefor rates which will not exceed those in effect from more distant points, will, under authority granted by the Interstate Commerce Commission, be established from an intermediate point hereunder upon one day's notice to the Commission and to the public.

WEIGHING AND RE-WEIGHING.

Subject to Rules and Regulations governing Weighing and Re-weighing, as published in C. R. R. Co. of N. J. Tariff I. C. C. A. No. 281, or subsequent issues.

ISSUED NEW YORK, MARCH 12, 1914. **EFFECTIVE APRIL 13, 1914.**

ISSUED BY

T. B. KOONS,
Vice-Pres. & Freight Traffic Mgr.,
C. R. R. Co. of N. J.,
NEW YORK, N. Y.

E. M. SNYDER,
Asst. Freight Traffic Manager,
C. R. R. Co. of N. J.,
NEW YORK, N. Y.

A. HAMILTON,
General Freight Agent,
C. R. R. Co. of N. J.,
NEW YORK, N. Y.

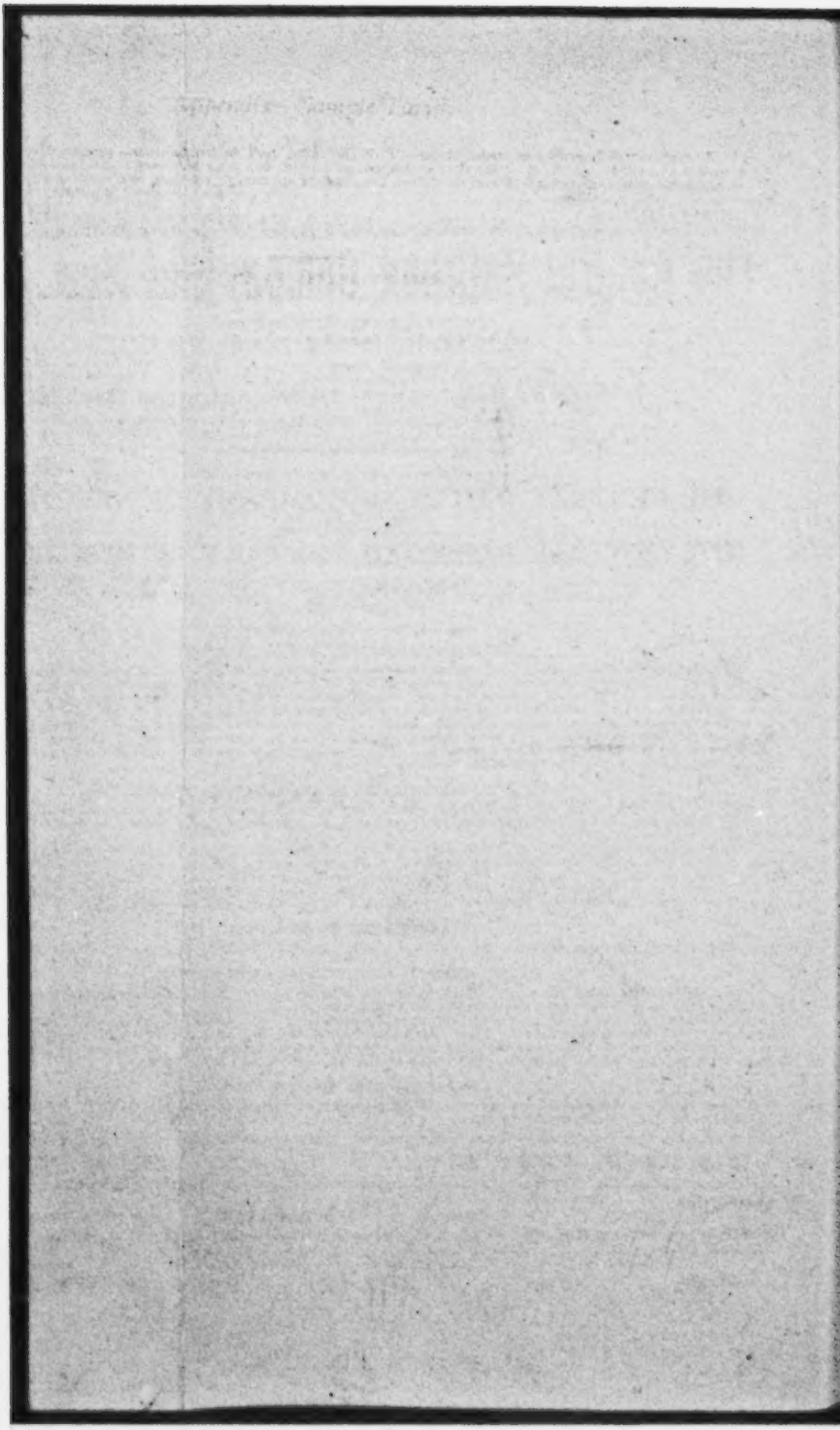
W. E. PUGH,
Division Freight Agent,
C. R. R. Co. of N. J.,
MAUCH CHUNK, PA.

300 Copies

3705

File K-12700 T. B. 5621-6721

9



List of Collieries, Washeries and Stations from which rates apply.
(All located in the State of Pennsylvania.)

Lehigh Region and Central Railroad Co. of New Jersey Tracks, Hauto, Nesquehoning and Mauch Chunk.

Name of Colliery.	Railroad Station.
ⓓ Alliance	Kaska
Beaver Brook	Audenreid
Beaver Brook Washery	Audenreid
Coleraine	Audenreid
ⓓ Hauto	Hauto
Honey Brook	Audenreid
ⓓ Maryd	Maryd
ⓓ Mauch Chunk	Mauch Chunk
ⓓ Nesquehoning	Nesquehoning
Pond Creek	Pond Creek
Sandy Run	Sandy Run
Upper Lehigh	Upper Lehigh

WYOMING REGION.

Name of Colliery.	Railroad Station.
Alden	Alden
Buttonwood	Buttonwood
Empire Washery	Ashley
	Franklin Junction
Hadleigh	Sugar Notch
Hollenback	Wilkes-Barre
Inman	South Wilkes-Barre
Jersey Washery	Ashley
Lee or Melville	Lee
Lee or Melville Washery	Lee
Maxwell's	Ashley
Melville or Lee	Lee
Melville or Lee Washery	Lee
Red Ash	Ashley
Ridgewood	Everhart Branch (West of Miners Mills, Pa.)
South Wilkes-Barre	South Wilkes-Barre
Stanton	Ashley
Sugar Notch	Sugar Notch
Sugar Notch Washery	Sugar Notch
ⓓ South Wilkes-Barre (C. R. R. Co. of N. J.)	South Wilkes-Barre
Wanamie	Wanamie

List of Stations to which Rates Apply and Rates Applicable thereto.

Anthracite Coal consigned to Piers at points shown below for reshipment, will be transported at following rates, which include shipping charges free on board vessels. Trimming charges will be additional and at rates shown below.

TO	Rates in Cents per Ton of 2,240 Pounds.			
	Prepared Sizes Briquettes and Boulets.	Pea.	Buck No. 1	Buck Nos. 2 and 3 or Smaller Sizes.
Elizabethport Pier (Elizabethport), N. J.	~~155~~	140	120	110
Port Johnston, "	~~155~~ 135	140	120	110
Communipaw Pier (Jersey City), "	160	145	125	115
Port Liberty, "	160	145	125	115

Trimming Charges.

The following charges for Trimming will be made by The Central Railroad Company of New Jersey on all vessels or boats taking Anthracite Coal at their Coal Piers, which Charges will be in addition to Rates from Shipping points to said Piers, viz.:

Elizabethport Coal Piers	Elizabethport, N. J.
Port Liberty Coal Piers	Jersey City, N. J.
Communipaw Coal Piers	Jersey City, N. J.
Port Johnston Coal Piers	Jersey City, N. J.

TYPE OF VESSELS.	CARGO COAL. Rates in Cents per Ton of 2,240 Pounds. (NOTES 1 AND 2.)	
	In Hold.	On Deck.
Scows, Lighters, Deck Lighters and other Open Boats and Barges	3	3
Hatch Boats and Hatch Barges, Single Deck	4	3
Sailing Vessels and Steamers, Single Deck	5	3
Sailing Vessels and Steamers, Double Deck and all Vessels not otherwise specified	7	3
	BUNKER COAL. Rates in Cents per Ton of 2,240 Pounds. (SEE NOTES 1 AND 2.)	
Tugs, Steamers, Pilot Boats, Light-house Boats and Tenders	7 ⓓ10	

(Here follows diagram marked # 11)

On Anthracite coal screenings accumulated at Port Johnston, N. J., and Elizabethport Piers, Elizabethport, N. J., account of shipments having passed over said piers and shipped in connection with the C. R. R. Co. of N. J., a charge of fifteen (15) cents per gross ton will be made for picking up, storage, and loading on board of boats or vessels, which charge will be in addition to rate from mines to foregoing piers.

FOR ANY ADDITIONAL LABOR PERFORMED ACCOUNT RE-SCREENING, ACTUAL COST OF SAID LABOR WILL BE CHARGED IN ADDITION TO CHARGE OF FIFTEEN (15) CENTS PER GROSS TON.

EXPLANATION OF REFERENCE MARKS.

①When boats are not shifted for bunkering on both sides, a charge for the additional labor will be made at the rate of 35 cents per man per hour.

②Rates as shown in this tariff from points with prefix ① include delivery of empty and movement of loaded cars by the C. R. R. Co. of N. J. on the tracks of the Lehigh Coal & Navigation Co., and Philadelphia & Reading Railway Company to and from collieries designated.

③Rates as shown in this tariff from C. R. R. Co. of N. J. tracks, South Wilkes-Barre, Pa., include delivery of empty and movement of loaded cars by the C. R. R. Co. of N. J. on the tracks of the D. L. & W. R. R. and D. & H. Co., from collieries in the Plymouth, Pa., district, viz.: Lance, Nottingham, Reynolds, Plymouth (Parish Coal Co.).

④In compliance with the Tenth Covenant of the lease from the Lehigh Coal and Navigation Company under which the Central Railroad Company of New Jersey operates the Lehigh and Susquehanna Railroad, a lateral allowance is made out of herein-named rates to the Lehigh Coal and Navigation Company on all Anthracite Coal originating on the latter's tracks in the Panther Creek, Nesquehoning and Hacklebarnie Districts mined and shipped by it, when coming, via the Hauto, Nesquehoning and Mauch Chunk gateways.

The Covenant referred to is set forth in the lease of March 31, 1871, and recorded in Deed Book No. 262, Page 480, of Luzerne County, and Deed Book, No. 43, Page 339, of Lackawanna County, Pennsylvania.

EXPLANATION OF NOTES.

NOTE 1. Leveling Coal at request of shipper or agent of vessel for separation of Cargo or other special purpose, will be charged for at the rate of 2 cents per ton based on the tonnage loaded at the pier of this company.

NOTE 2. When wheeling is performed an additional charge will be made therefor at the following rates.

Side-wheel Steamers	12 Cents per Ton of 2,240 Pounds.
All other Vessels	15 Cents per Ton of 2,240 Pounds.

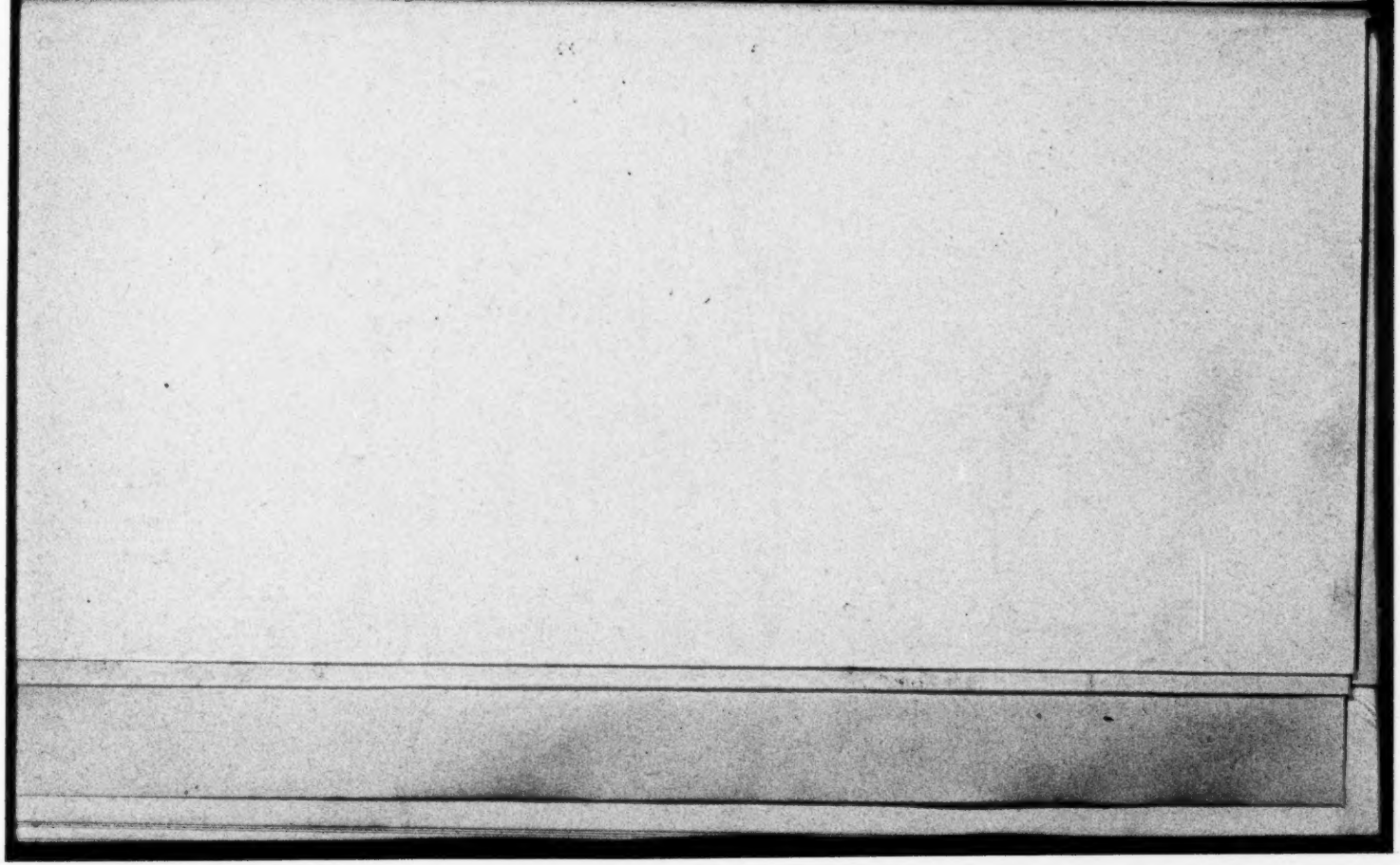
MAP

TOO

LARGE

FOR

FILMING



12 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original questions certified to the Supreme Court of the United States, in the case of Lehigh Coal & Navigation Company, Plaintiff in Error, vs. United States, Defendant in Error, No. 2136, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this sixth day of June in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-first.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals,
Third Circuit.

Endorsed on cover: File No. 26,007. U. S. Circuit Court Appeals, 3d Circuit. Term No. 540. Lehigh Coal & Navigation Company vs. The United States. (Certificate.) Filed June 16th, 1917. File No. 26,007.

IN THE

Supreme Court of the United States.

United States of America

vs.

The Lehigh Coal and Navigation Company.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS TO THE THIRD CIRCUIT.

BRIEF FOR THE LEHIGH COAL AND NAVIGATION COMPANY, DEFENDANT IN THE DISTRICT COURT AND APPELLANT IN THE CIRCUIT COURT OF APPEALS.

The Question Involved.

The question here for decision is that mentioned by this Court in Armour *vs.* U. S., 209 U.

S. 59, 85-86, but not directly presented or decided in that case:—

> "Whether shippers who pay a rate under the honest belief that it is the lawfully established rate, when in fact it is not, are liable under the statute because of a duty resting on them to inform themselves as to the elements essential to establish a rate as required by law."

Summary of Facts in the Certificate.

Defendant's Pennsylvania charter permitted it both to mine coal and to build and operate a railroad. In 1871, defendant had leased to the Central Railroad of New Jersey the railroad line which, prior to the lease, defendant had constructed and used to haul its coal from its mines to market at New York. These mines, being the nearest anthracite mines to tidewater, had always enjoyed, as against the other more distant mines in the Lehigh Region, the lower rate to which their geographical position naturally entitled them.

To perpetuate this situation there was inserted in the lease the 10th covenant, which, as modified by the parties in 1878, provided for a rate from the defendant's mines equivalent to 86 per cent. of that charged from the other more distant mines in the Lehigh District.

In pursuance of this covenant the Central Railroad made to the defendant an allowance of 14 per cent. of the Lehigh Region Rate, by a credit on its freight bills.*

Between 1887 and 1906 no mention of this allowance was made in the tariffs filed by the Central Railroad. After the passage of the Hepburn Act, however, there was inserted in these tariffs, as a foot note, with a proper reference mark to the figure $1.55, the following provision, in modification of that figure as applied to the shipments by this defendant from Hauto and Nesquehoning to tidewater at Elizabethport. . .

> "(4) In compliance with the Tenth Covenant of the lease from the Lehigh Coal and Navigation Company under which the Central Railroad Company of New Jersey operates the Lehigh and Susquehanna Railroad, a lateral allowance is made out of the hereinnamed rates to the Lehigh Coal and Navigation Company on all anthracite coal originating on the latter's tracks in the Panther Creek, Nesquehoning and Hacklebarnie Districts mined and shipped by it, when coming via the Hauto, Nesquehoning and Mauch Chunk gateways.
>
> The covenant referred to is set forth in the lease of March 31, 1871, and recorded in Deed Book No. 262, page 480 of Luzerne County

*The amount of the allowance was arrived at by taking 14% of $1.37, this being the $1.55, less 18 cents wharfage and shipping charge, making the allowance 19.18 cents.

and Deed Book No. 43, page 339 of Lackawanna County, Pennsylvania."

The officials of the Navigation Company were advised by the traffic officials of the Central Railroad, and also by its President, its Vice-President and General Counsel, and by its General Attorney, that the above note had been made part of the tariffs in full compliance with the Act of 1906, and that in view of the note having been made part of the tariffs, the payment and receipt of the allowance would comply with the tariff and with the law.

Furthermore, in 1908 the Navigation Company had been informed by the Central Railroad, that the Interstate Commerce Commission (acting by one of its important officials who was in charge of the subject of tariffs) had specifically approved the form of the tariff containing the note, in spite of the fact that the amount of the allowance had not been specified therein—the Commission having under consideration at the time the question whether the payment and receipt of the allowance under the tariff and foot note were proper.

By reason of such advice and information the defendant had thereafter honestly believed that the receipt of the allowance was not in violation of the tariff or of the Act, but was in compliance therewith.

In corroboration of this belief on the part of the officials of the company, it further appeared that during the nine years between 1906 and the time of the indictment, the Central Railroad had filed with the Commission 262 tariffs containing this note, all of which had been accepted by the Commission, apparently without objection or criticism other than that above mentioned in 1908. Further still, that in 1909, after the approval by the Commission of the form of the tariff as above set out, the Commission's investigators had made examinations of the defendant's books, records and accounts, and that by reason of such examinations the Commission had been informed that the defendant had received, and was receiving the allowance, but did not object either to the form or to the substance of the practice.

Under the foregoing facts, there can be no doubt but that a jury would have been amply justified in concluding that, in receiving the allowances, the defendant did so in the honest belief, the result of a reasonable conclusion on plausible grounds, that the Commission approved of the practice, the mention of the allowances in the note apparently being sufficient to justify their payment and receipt under the tariff, in spite of the fact that the precise amount thereof was not stated in dollars and cents.

The question here involved therefore resolves itself into this:—

Where a shipper has followed the construction of a published tariff approved by the Commission, or a construction which he has been led to believe, on reasonable grounds, has received such approval, can such shipper be convicted of receiving a rate different from that provided in such tariff because the Court takes a different view as to the meaning or legality of the tariff?

This, it will be noted, is the exact question stated by Mr. Justice Day in the Armour case and above quoted.

The Armour Case.

In that case Armour had a contract with the Burlington Railroad for the maintenance of an existing twenty-three (23¢) cent rate from June, 1905, for the balance of the year. In August the railroad filed a supplement to its tariff raising the rate to thirty-five (35¢) cents.

The Armour Company in the honest belief that its contract gave it the right to disregard the supplemental tariff and the increased rate which it knew was specified thereby, received a rebate of twelve (12¢) cents from the thirty-five (35¢) cent rate and was convicted.

This case arose under the Elkins Act as originally passed in 1903, before the insertion of the word "knowingly" by the amendment of 1906.

This Court, in sustaining the conviction, held that where a shipper deliberately received a less rate than that for which he knew the tariff provided, it was immaterial that in so doing he was guilty of no moral turpitude, believing honestly that his contractual rights with the railroad to observe the contract rose superior to his statutory duty to the Government to follow the tariff.

It was distinctly recognized by this Court that a different question was presented where the defendant's good faith was directed **not to the observance of private contractual rights or duties on his part, but to his public duty to follow the tariff.**

"Whether," said Mr. Justice Day, "shippers who pay a rate under the honest belief that it is the lawfully established rate, when in fact it is not, are liable under the statute because of a duty resting on them to inform themselves as to the elements essential to establish a rate as required by law, is a question not decided because not arising on this record."

In the case at bar the good faith relied on by the defendant to rebut the conclusion of a "knowing" receipt of less than the rate provided in the tariff, was not the mere reliance on its contract as rising superior to the law, but was its honest belief that the note in the tariff in force at the

time it received the allowances properly provided for them, so as to make their receipt by it strictly in accordance with proper tariff authority.

While this defendant knew, as Armour did, that its contract with the railroad entitled it to a rate 14 per cent. less than that to be paid by the other more distant Lehigh shippers, and knew in addition that there was a perfectly proper historical and geographical reason for this, it also knew that the tariff specifically stated on its face that it should receive an allowance out of the $1.55, and that the tariff officer of the Interstate Commerce Commission, having under consideration the question whether the payment and receipt of the allowance under the tariff and foot-note were proper, had specifically approved the form of the tariff.

This defendant's good faith was therefore directed, not merely to the enforcement of its private contractual rights with the railroad, but to the observance of its public statutory duty to the Government to adhere to the provisions of the tariff.

The essential consideration in this case, therefore, and the vital difference between this case and the Armour case, is **the distinction between an honest reason for a knowing failure to observe a tariff, and an honest although perhaps mistaken attempt to comply with its provisions.**

It is the same sort of distinction that might

be made in a murder case between the invalid defense that defendant had purposely shot the decedent under the honest belief that it was his right and duty to do so because their families were in a feud, and the valid defense that he had accidently shot a friend in defending him from a burglar.

In the one case he meant to kill his enemy thinking he had a right to; in the other case he did not intend to kill his friend at all.

There was no breach of conscience in either case, but in the one the specific intent was directed toward the forbidden act, while in the other it was not.

Did the Tariff Properly Establish or Specify a Fixed Rate?

Preliminary to a discussion of the language of the Act and of the important history of its development in connection with the use of the word "knowingly," certain additional collateral considerations should be pointed out.

The crime with which the defendant was charged, was "knowingly" accepting a less rate than that specified in the tariffs published and filed as required by the Interstate Commerce Act. **There was no charge of discrimination.**

The only offense charged was the knowing disregard of a properly established tariff rate.

In order to sustain this charge two essential things must have been proved by the Government:—

First, that the Central Railroad Company of New Jersey duly published its tariffs establishing, in the manner required by the Interstate Commerce Act, a rate on coal from Nesquehoning to Elizabethport; second, that The Lehigh Coal and Navigation Company knowingly accepted transportation at a less rate than that specified in such tariffs.

Before any question could arise as to the knowing departure by a shipper from the rate established by the tariff, it must affirmatively have appeared that the carrier had duly published a tariff which fixed a rate, in the manner required by the Act, as the standard which the law forbade the shipper to disregard.

If the tariffs in this case, in the column applicable to shipments from Nesquehoning, had contained the figure $1.55 and nothing else, then the mere fact that the tariff did not specify the net rate which the shipper ultimately paid would not excuse the shipper, even though he paid the less rate in good faith, in pursuance of an honest contract. This was what the Armour Case decided.

In the case at bar, however, the tariff did not stop with the figures $1.55 and did not inform the

Navigation Company and the shipping public that this was the rate which the Navigation Company was to pay from Nesquehoning to Elizabethport.

It gave specific notice that $1.55 was NOT the rate which the Navigation Company was to pay.

Opposite the figure $1.55 was a reference mark to a note, **which was part of the tariff,** and which stated in specific and unmistakable language that "out of" this $1.55 an unspecified allowance was made to the Navigation Company.

In connection with the payment and receipt of these allowances one of two things must have been so. Either the allowance was paid "out of the rate" and constituted a reduction in the charge for transportation, or it was not.

In the latter case, the payment being not out of the rate, but entirely independent thereof, was not a rebate of freight charges.

If, however, the payment was "out of the rate," as the tariff stated it was, then the note so stating must have had the necessary and inevitable effect of changing what would otherwise be a fixed and established rate, to an unascertainable amount, and of producing exactly the same situation as we should have had if the tariff had stated the rate to be such as was agreed on in the contract, naming no figure whatever.

If the tariff had so stated, providing merely that the rate to be charged the Navigation Company should be such as was required by a contract recorded in Luzerne County, this unspecified rate would not be made any more specific by a note to the effect that to the contract rate 75 cents was to be added. Such a proviso would not make the duly established tariff rate 75 cents merely because that amount happened to be all that the Government attorneys could find in figures in the tariff.

Exactly the same is true where the note provides for an unspecified deduction from a figure named. The rate fixed by the tariff on these shipments was not $1.55. The tariff itself said that it was not, but was a less figure which the tariff did not specify, and which could in no way be determined except by going outside the tariff.

In both cases the CARRIER could be convicted of failing properly to specify its rates, but in neither case could a SHIPPER be guilty of receiving transportation at a rate less than that duly specified in the tariff.

Distinction under the Act between the Duties of Carrier and Shipper.

The liability of the shipper and carrier to criminal prosecution under the Act are very different. There are a number of offenses of

which the carrier may be guilty, with which the shipper is not concerned. The principal one of these is the provision contained both in Section 6 of the Interstate Commerce Act and in the first part of Section 1 of the Elkins Act, which makes it a criminal offense for the carrier to fail to specify in its tariff the rate to be charged by it.

Paragraph 7 of Section 6 of the Act provides as follows:—

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act."

Section 10 of the Interstate Commerce Act makes the wilful doing or omission of anything prohibited or required by the Act a misdemeanor.

Section 1 of the Elkins Act provides: —

> "The wilful failure upon the part of any carrier subject to said Acts (the Interstate Commerce Act) to file and publish the tariffs or rates and charges as required by said Acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor."

The filing and publication of tariffs in the form required by the Act is the exclusive province of the carrier. With such filing and publication the shipper has nothing whatever to do.

The Interstate Commerce Commission has power to regulate the form of the tariffs, but the shipper has no standing whatever to direct the carrier as to the form thereof. If the carrier files a tariff with the Commission in an ambiguous form, or specifies a rate, regulation or other feature in a manner open to more than one construction, the shipper is not by law required to refrain from shipping until the carrier corrects the tariff.

If he were, the Act, whose purpose was to encourage and facilitate commerce, would become an Act to restrain and hamper commerce.

If the rate is specifically named, without qualification, and if the tariff provision is so clear that no reasonable man can have any doubt as to the meaning thereof, then the shipper can be prohibited from accepting transportation at any different rate without in any way interfering with commerce between honest people.

If, however, the tariff itself contains provisions relative to the payment of monies due a shipper and he reasonably interprets the same as properly providing for such payment by the carrier, the shipper is clearly not criminally guilty of

knowingly accepting a rate different from that specified by the tariff.

Admitting for the purpose of this argument that the allowance was made "out of the rate" and that its payment resulted in the reduction of the rate from $1.55 to $1.3582, the Lehigh Coal and Navigation Company was clearly entitled to have the Central Railroad make proper tariff provision for a rate not exceeding that amount.

If the Central Railroad Company of New Jersey had named this rate of $1.3582 in its tariff there would have been no question but that the Lehigh Coal and Navigation Company was fully justified in having its coal hauled for that rate and there could have been no complaint by the Central Railroad Company of New Jersey or by the Government that the Navigation Company had violated its contractual, its social or its criminal obligations, actually, technically, constructively or in any other way.

When the Central Railroad Company of New Jersey specified in the tariffs that "out of" the $1.55 an allowance was to be made to the Lehigh Coal and Navigation Company, that company was entirely justified in assuming that since the tariffs provided that an allowance was to be made, it might properly accept the alowance mentioned in the tariff without being a criminal.

After the insertion of this note in the tariff the rate specified by the tariff was not $1.55, nor was the actual rate to be charged specified in the tariff, since the tariff itself stated on its face that the rate to be charged the Navigation Company was not the figure named in the tariff, but a sum which the tariff gave express notice was not determinable therefrom.

Good Faith in Complying with Tariff *vs.* Good Faith in Reliance on Contract.

As we have heretofore noted, the Armour case is authority only for the proposition that good faith, in the observance of a contract obligation, in violation of a tariff provision, is irrelevant.

No case has held that, in a prosecution for knowingly accepting a less rate than that specified in the tariff, it is irrelevant that the defendant was endeavoring in good faith to fulfil, not merely his contract obligation to the carrier, but his legal and statutory obligation to the Government,—doing only that for which he honestly believed the tariff made proper provision.

The defendant's proof of good faith in this case consisted of two parts. The first of these, standing alone, would, under the Armour case have been irrelevant and have presented no de-

fense to the indictment. Taken together with the second part, however, and as introductory thereto, it was, we submit, both relevant and material.

Defendant first showed, as preliminary and introductory to its main defense, that the payments in question were made in pursuance of the tenth covenant in the lease under which the Central Railroad had leased the Lehigh and Susquehanna Railroad. The original covenant, as modified in 1878, provided for a net rate to the defendant from Hauto and Nesquehoning which should not exceed 86 per cent. of that charged by the Central and Lehigh Valley Railroads from the mines in the Lehigh Region via Penn Haven. In 1887, the manner of carrying out this covenant was changed by the parties, so that thereafter the Navigation Company was charged the rate applicable to the Lehigh Region ($1.55) in consideration of the Central Company agreeing to pay to it a sum equal to 14 per cent. thereof, after the deduction of 18 cents on account of wharfage and shipping charges.

The foregoing was introduced by the defendant, not as constituting its main defense and not as proving the kind of good faith which it contended justified it under the Act, but as preliminary or introductory to its real defense and as laying the foundation therefor,—showing that it

had a real right to the money received and that the payments were not a mere device to secure rebates.

While this was all important for the consideration of the jury, in determining whether or not it was in fact endeavoring in good faith to comply with the tariff, the proof of good faith which is relevant at the present stage of the case—where the question is whether there is anything for the jury to consider—is found in the second branch of the proof of good faith—**the evidence that defendant was honestly endeavoring, not only to live up to its contract with its lessee, but to observe its statutory duty to the Government to comply with the provisions of the published tariffs.**

In the case at bar, the defendant honestly believed that in accepting the allowances, it was doing what the tariff provided for, because the note, **which was a part of the tariff,** expressly stated that the allowances were to be made to it out of the $1.55, and because it had been advised that the official in charge of the Tariff Bureau of the Interstate Commerce Commission, who of all men should know whether or not a tariff was in legal form or what it meant, had ruled that the tariff as filed with the note in it, made the payment of the allowances legal without any alteration of the tariff.

It is entirely immaterial whether the Commission was wrong, and it is also immaterial whether the allowances were rent, or were payments for an instrumentality of transportation, or were refunds out of the rate.

The point is that **the Navigation Company honestly believed, in a genuinely doubtful case, on grounds which would be ample to produce such belief in anyone, that the tariff properly provided for a payment to it of the allowances.**

Whether this defense on its part was bona fide, or was a sham, was for the jury to say.

This is not at all a case like the Armour case, where the shipper knew that it was disregarding the tariff, but honestly believed that it had a right to do so.

Here we honestly believed we were observing the tariff. How then can it be said that we knowingly disregarded the tariff?

The defense of the Navigation Company was not that its contract gave it the right to disregard the tariff or brought the allowances outside the tariff, but that it honestly believed, no matter what the allowances were,—whether rent or a reduction in rates or what not—that their receipt by it was properly provided for in the tariff.

While it relied on its contract for its right to receive the allowances as between it and the railroad, yet for its right to receive them in com-

pliance with the Interstate Commerce Act it relied, not on its contract, but on the tariff, which it believed the Interstate Commerce Commission had approved as making proper provision for the continuance of the practice.

Although it may be that the mere receipt by the Commission of a tariff without objection does not amount to an approval of its validity, certainly the receipt by the Commission of 262 tariffs, each including the note in question, particularly in view of the other circumstances referred to in the certificate, would constitute an additional bona fide ground for the shipper to believe that the continuance of its practice in receiving the allowance, met with the approval of the Commission.

Berwind-White Coal Co. *vs.* Chicago & Erie R. R., 235 U. S. 371, 375.

With the foregoing considerations, we may turn to the discussion of the provisions of the Act and of the decisions of the Federal Courts in support of our position, that no shipper can be convicted of knowingly accepting a less rate that that specified in the tariff, if it be shown that the shipper acted under the honest belief that what it did was in compliance with the

tariff provisions, **and did not know that it was doing something contrary to the tariff.**

Although evil intent and moral turpitude are immaterial, it must appear that the Navigation Company *actually knew* that it was doing the thing prohibited—that it was accepting an allowance for which it knew there was no tariff authority.

History of Use of Word "Knowingly" in Interstate Commerce Acts.

The history of the development of the Elkins Act is peculiarly significant in connection with the use of this word "knowingly," as applied to a failure by shippers to adhere to tariff provisions.

The Elkins Act was passed in 1903. Prior to that there was no obligation on shippers to observe tariff rates, the only duty being that of the carriers. Section 6 of the Interstate Commerce Act, in effect from 1887, required the carrier, under pain of criminal prosecution, to specify the rates to be charged by it in tariffs filed with the Commission, and when the tariffs had been filed, made it unlawful for the carrier to

> "charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passen-

> gers or property, or for any service in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force."

The above provision was contained in Section 6 of the Act. Although the language was slightly altered by the Amendment of 1906, the essential provisions were left unchanged.

Section 10 of the Act made the wilful violation of any of the requirements or prohibitions of the Act by any **officer or agent of a carrier,** a misdemeanor, punishable by a fine of $5000 for each offense, and, in certain cases, by imprisonment.

The Elkins Act of 1903 was not an Amendment to the Interstate Commerce Act, but in the nature of a supplement to it.

It first provided that any offense committed by an officer or agent of the carrier should be an offense by the corporation itself, which should be liable to the penalties prescribed in the Act "except as such penalties are herein changed."

It then provided as follows:—

> "The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof

> the corporation offending shall be subject to a fine of not less than $1000 nor more than $20,000 for each offense."

This provision introduced no new offense but increased the maximum fine to $20,000. The failure to file or observe the tariff on the part of the carrier must in order to be an offense, have been "willful."

It then proceeded to define the offense with which the defendant is here charged and of which the shipper, as well as the carrier, may be guilty.

> "And it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall* offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor,

and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

The Commission was further given power, with the assistance of the Attorney General, to compel the carriers properly to formulate and to observe their tariffs.

The important consideration, in connection with the above provision of the Elkins Act as enacted in 1903, is that it does not contain any requisite that the offense must be either "wilfully" or "knowingly" committed.

It was doubtless in view of this feature that the Elkins Act went on to provide that "for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished."

The amendment of 1906, which was passed after the occurrence of the facts which gave rise to the Armour case, made two very important changes in the Elkins Act as enacted in 1903.

It added imprisonment for two years as a punishment for the giving or receipt by carrier or shipper of transportation at less than the duly established tariff rates, but at the same time it inserted the word **"knowingly"** at the point where we have placed the * in the provision, above

quoted, prescribing the punishment for the offense, making the clause as amended read as follows:—

> "Every person or corporation, whether carrier or shipper, who shall KNOWINGLY, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

The thought in the mind of Congress in making the above changes in the Elkins Act is clear. As the punishment for doing the thing prohibited was to be imprisonment, **no one was to be convicted of this offense unless it was done "knowingly,"—unless he actually knew that he was doing the thing which the Act forbade.**

In view of the above circumstances, the word "knowingly" was clearly intended to have, and must be given, vital significance.

See Potter *vs.* U. S., 155 U. S. 438, 446.

Distinction between Civil and Criminal Proceedings.

With the history of the Act and its provisions thus in mind, we may now turn back to the ques-

tion suggested but not decided by this Court in the Armour Case:—

> "Whether shippers who pay a rate under the honest belief that it is the lawfully established rate, when in fact it is not, are liable under the statute because of a duty resting on them to inform themselves as to the existence of the elements essential to establish a rate as required by law."

Of what nature then, is the duty of a shipper to ascertain the terms of a filed tariff, and, having ascertained them, to give them the interpretation and effect which shall ultimately be adopted by the Court of last resort?

Is this an absolute duty, which the shipper must fulfil completely and unerringly on pain either of stopping business or of going to jail, or is it merely a relative duty, consisting in the obligation to use good faith and honest endeavor in the ascertainment of and compliance with the provisions of the tariffs?

The use of the word "knowingly" in the Hepburn Act, in view of the historical development of the clause in which it occurs, demonstrates, we submit, that, as applied to criminal proceedings the duty is a relative and not an absolute one.

In this connection, the distinction between civil and criminal cases arising under the Act is essential.

In a number of decisions, arising on the civil side, this Court has held that where a rate has been properly fixed by the tariff, the shipper and the carrier cannot contract for a less rate, and that a shipper who, in good faith, relying on a wrong quotation of a rate by the carrier's agent, has made a sale of his product at destination based on the rate so quoted, has no legal redress against the carrier.

In certain cases of this kind it has been intimated, in the course of the opinion, that for the purpose of the question then under consideration the shipper was "conclusively presumed" to know the rate fixed by the tariff.

This consideration, we respectfully submit, is not the real basis for such decisions, which was not that the shipper is presumed to know the rate, but that the rate fixed by the tariff is the only rate which the law permits the shipper to pay or the carrier to receive, no matter whether the shipper knows it or not.

In a criminal case, where **actual knowledge** by the shipper is made an essential requisite of the offense, the question presented is entirely different.

"The law intended," as was said by the Court in U. S. *vs.* Michigan Central R. Co., 43 Fed. 26, "to punish only an active and wilful violator of its provisions."

The Standard Oil Case.

Although there appears to be no case in which the question here involved has come before this Court for decision, this question has been ruled on by the Circuit Court of Appeals for the Seventh Circuit in a very famous case,—the $29,000,000 Standard Oil decision:—

Standard Oil Co. *vs.* U. S., 164 Fed. 376 (July 22d, 1908).

That case arose on shipments made between September, 1903, and March, 1905, before the Amendment of 1906 inserting the word "knowingly." The indictment, however, which was returned August 27th, 1906, after the passage of the Amendment of 1906, charged that the less rate was "knowingly" paid by the defendant.

The ruling by Judge Landis in the lower Court is clearly brought out in the following extracts from Judge Grosscup's opinion.

After summarizing briefly the charges in the indictment and quoting the pertinent provisions of the Act, the opinion proceeds to group the 169 assignments of error under three heads, with the first only of which we are here concerned:—

> "*First.*—To the view adopted by the trial Court, carried out in its rulings on the admission and exclusion of evidence, and em-

> bodied in its charge to the jury, that a shipper can be convicted of accepting a concession from the lawfully published rate, even though it is shown, as bearing on the matter of intent, that the shipper, at the time of accepting such concession, did not know what the lawfully published rate actually was;"

The Court then discusses the evidence bearing on this question which Judge Landis had rejected, and the portion of his charge in which he had dealt with the question of guilty knowledge, where Judge Landis had said:—

> "The indictment alleges that the defendant accepted the concession knowingly. To sustain this averment the proof need not establish that the defendant had actual knowledge of the lawful rate. * * * The defendant **must be presumed** to have known that the defendant would be guilty of a misdemeanor if it accepted a rate for the transportation of property in interstate commerce which was lower than a rate thus published at a railway station or traffic office and filed with the Interstate Commerce Commission."

Judge Grosscup's opinion, holding the above charge to be erroneous, then proceeds as follows:

> "Of course if this view of the law is sound, the action of the Court, in its rulings on the

evidence offered, as well as its charge, is without error; for if a shipper can be held guilty of accepting a concession from the lawful published rate, even though the shipper had no knowledge of what the lawful published rate was—if the plaintiff in error, in the transactions before us, was bound, at its peril, first to successfully disentangle the Alton's confused tariff sheets **and then correctly to interpret them**—the evidence excluded could have had little determinative weight in any judgment of the jury upon the guilt or innocence of the shipper. But if, on the contrary, it is necessary to a conviction of a shipper of accepting a concession from the lawful published rate, that it should appear as bearing on intent, that the shipper knew what the lawful published rate was, the evidence offered and excluded clearly relates to the fact of such knowledge, and was erroneously excluded, because the plaintiff in error was thereby deprived of its right to have the judgment, not of the Court alone, but of the jury as to whether the plaintiff in error had such knowledge as charged him with an intent to violate the law. Indeed the whole question is the fundamental one of whether a shipper is guilty, under the Interstate Commerce Act, of having accepted a rate less than the lawful published rate, even though he does not know, at the time, that the rate accepted

> was in fact less than the published rate, thereby having no intent to violate the law; or, as the Supreme Court stated the question in Armour Packing Company *vs.* United States (decided March 16th, 1908), 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, whether 'shippers who pay a rate under the honest belief that it is the lawful published rate when in fact it is not, are liable, under the statute, because of a duty resting on them to inform themselves as to the existence of the elements essential to establish a rate as required by law.' "

Judge Grosscup's quotation is of the passage at the end of the Armour decision, rendered four months before. He distinguishes it from the case he is deciding just as we distinguish it from the present case, on the ground that the Armour Company knew that the tariff rate was 35 cents but honestly believed that it had a right, because of its contract, to disregard the tariff and to receive a concession for which it knew the tariff made no provision whatever.

The opinion of Judge Grosscup then continues as follows:—

> "The trial Court was doubtless influenced by judicial holdings in cases under statutes against smuggling, the sale of liquors to minors, and other cases arising out of fiscal

and police regulations, for the mere violation of which, irrespective of the motive or intent, certain penalties are enforced (Greenleaf on Evidence, section 21; 1 Wharton Crim. Law (10th Ed.) section 23a; United States *vs.* Bayard (C. C.) 16 Fed. 376 and other cases cited); and thus influenced, proceeded on the view that **if the shipper can, by diligent endeavor, decipher out of the tariff sheets, no matter how entangled or confused they may be, a rate that a Court upon subsequent investigation, no matter how close the question thus raised may be, determines to be the lawful published tariff rate, under all the circumstances named,** the shipper may not plead that under information from the carrier or any other investigation short of diligent research on his account, he mistook another rate to be the lawful published rate—may not plead that he had no intent to violate the law."

In connection with the foregoing passage, as also with the words which we have emphasized in the previous paragraph quoted, we desire to call particular attention to the feature of the **interpretation** of the tariffs as distinguished from a knowledge of the mass of words and figures contained in them. It is not enough that the shipper had the tariff in his hands and had read it through. If the jury believe that he

honestly did not interpret it in the way the Court finally determines to be correct, still if he acted on what he believed to be its meaning, he is not guilty.

Judge Grosscup then proceeds to dispose of Judge Landis' erroneous interpretation of the statute.

> "In this interpretation of the interstate commerce law, so far as it relates to shippers, we cannot concur. The cases cited by the government, such as those requiring liquor sellers, at their peril, to know whether the person to whom a drink is sold, is a minor, or within the prohibitions of the act or not, are not controlling, nor very persuasive. **The Interstate Commerce Act was intended to promote not to restrain trade and commerce—to secure fair dealing in commerce through uniformity, not to put obstructions in the way of commerce.** Texas & Pacific R. R. *vs.* Interstate Commerce Com., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940. Surely the farmer who brings his produce to town to be shipped to the city markets, or the small merchant shipping to the country, or the householder who ships his furniture, when changing his residence, were not meant by the interstate commerce law to be guilty of having accepted a concession, merely because they took the word of the carrier or his agent, as to what the rate was, accepting

such rate stated in the honest belief that it was in fact the regularly established rate. In this respect the shipper and the carrier stand on different ground. The carrier is required by separate provision of the law to establish and publish rates (section 6) and is forbidden to charge or collect from the shipper a rate greater or less than such established and published rate; and as to the carrier the doctrine laid down by Wharton and by Judge Cooley in Bonker *vs.* People, 37 Mich. 4, that ignorance of the fact is no defense is perhaps applicable; **for the carrier having established and filed the rate, can very justly be denied the right to plead that he overlooked or forgot the rate that he has thus knowingly established and filed.** But is the ordinary shipper, under any reasonable view of the situation to which the law relates, thus bound—bound at his peril, under this law intended to promote commerce, to cipher out, before he can safely put anything that he has into commerce, all the confusing papers and figures that generally make up the tariff sheet? Plainly not, it seems to us. As to him, the language of Bishop (1 Bishop, New Criminal Law, section 286), seems sound that:—

"'It is never right to punish a man for walking circumspectly in the path which appears to be laid down by the law, even though some fact which he is unable to discover renders the appearance false. And for the

Government, whether by legislation or by judicial decree, to inflict injustice on a subject, is to injure itself more than its victim. And the Court should, in all circumstances, so interpret both the common law and the statutes as to avoid this wrong.'

"And though it is true that large shippers like the plaintiff in error do not usually take the word of the carrier as to what the rate is, but examine for themselves the tariff sheets, and have all the knowledge that is necessary to an intelligent examination, from which it might easily follow, as a matter bearing wholly on the weight of the evidence, that professions of ignorance upon the part of such shipper would stand on a different plane of credibility from a plea of ignorance put forward by the ordinary shipper, it does **not, on that account, follow that the ultimate question of intent, to be submitted to the jury, is not the same whether the shipper be a large one, or a small one; for the law is the same for all shippers and the duty devolving on the government is the same, viz.: that before conviction, there must be proof of all the facts upon which the shipper's offense is predicated.**

"This view of what is essential to constitute the offense, makes it plain that the trial Court was in error, as a matter of law, in the application, **to the case of a shipper,** of the principles that the trial Court applied to this case."

The Court then goes on to point out that the rate which Judge Landis "deciphered" out of the complicated references and cross references in the tariffs and classification sheets relied on by the Government, is not clearly the lawful rate duly established by tariffs filed by the carrier.

Judge Landis' decision was reversed, and the case remanded for a new trial.

When it came up again, Judge Anderson, before whom it was tried, in spite of the popularity of Judge Landis' prior decision, courageously directed the defendant's acquittal, on the ground that since the alleged tariff rate could be determined only by reference to a paper mentioned in the tariff, but not filed as a part of it, the tariff fixed no basic rate, from which a shipper could be held criminally responsible for departing.

Attempted Distinction between Errors of Fact and Errors of Law.

It has been contended by the Government that there is a distinction between an error of fact and an error of law. It may be, it is argued by the Government, that a shipper is excused if he does not in fact know that a given tariff had been filed or if he has been misled by the carrier's agent into supposing that a paper naming the rate he pays has been filed when in fact it has not. Yet

it is contended that if the shipper has the tariff in his hand, and reads all the words and figures in it, he is legally bound to interpret them correctly, according to the interpretation which he must foresee will ultimately be adopted by the Interstate Commerce Commission, the District Court, the Circuit Court of Appeals or the Supreme Court, whichever is the last to pass on the question. It matters not at all how complicated are the provisions, how obscure the references, or how subtle the legal difficulties which the carrier may insert in the tariff and which the shipper has no chance whatever to correct or to clarify.

Aside from the above authority, a moment's consideration of the logical consequences which must follow the adoption of a distinction between an error in fact and an error of interpretation or of legal construction, will be sufficient to demonstrate its unsoundness and to show the law to be as we contend—that **if the shipper honestly believes he is observing the tariff and doing only what the tariff properly provides for, he is innocent.**

It makes no difference that he relies on a paper which is not in fact filed as a tariff, or that the words and figures which he reads in the tariff do not have the legal significance which he honestly attributes to them, or that the Commission or the Court ultimately determines that a tariff

provision on which he honestly relies in justification of his action is, under the law, as finally construed, illegal and improper.

If the jury believes that his mistake was an honest one, he must be acquitted, no matter whether his mistake was one of fact or of legal interpretation.

In a great mass of cases, tariffs filed by the carriers have come before the Commission and the Courts for consideration, both as to their legal meaning, and as to the legality and sufficiency, under the law, of provisions contained therein.

In every one of these cases the shipper said the tariff, legally construed, meant one thing, and the carrier said that it meant another thing.

In each of them, under the shipper's view he would pay a less rate than he would pay by following the interpretation of the carrier. If it were otherwise the shipper would never have made the fight.

Every one of these questions was a pure question of law. Some of them were ultimately resolved in favor of the carrier, some in favor of the shipper.

The one that was wrong made a mistake, not of fact, but of law.

Suppose in any of these cases the shipper had been able to induce in the carrier the honest conviction that his construction was correct and

the carrier had, in pursuance of this honest conviction, shared by the shipper, accepted the lower rate. Could the shipper be convicted of "knowingly" violating the tariff merely because, in a prosecution instituted by the assiduous Government investigators, the trial Judge concluded that, as a matter of law, the shipper's interpretation of the tariff was erroneous?

In Central Railroad of New Jersey *vs.* Hite & Raffeto, 166 Fed. 976, the demurrage tariff of the Central Railroad provided that the demurrage charges on coal should run between the "date of arrival and the date released."

The shipper contended that the correct legal meaning of "date of arrival" was the date when the consignee received notice of the car's arrival, and that "date released" meant the time when the consignee notified the carrier that the vessel was at the dock ready to receive the coal.

The carrier, on the other hand, maintained that "date of arrival" meant the date when the car actually arrived, and that the "date released" was when the coal was actually dumped by the carrier into the shipper's vessel.

The District Court upheld the contention of the shipper on both points, but the Circuit Court of Appeals for the Third Circuit took the opposite view as to the meaning of "date released" (171 Fed. 370).

If instead of having this doubtful question decided by the Courts, both the carrier and the shipper, under the honest belief that the shipper's construction of "date released" was the correct one, had settled on that basis, could the shipper have been sent to jail because it had made a mistake of law and had improperly interpreted the provision of the tariff, whose words and figures they knew full well, but whose legal significance nobody could know until it had been settled by this Court?

And if the same shipper had later been indicted in New York, could he have been convicted if the Government could have induced the Circuit Court of Appeals for the Second Circuit to adopt a construction of "date of arrival" different from that adopted in the Third Circuit, so that more demurrage would have accrued than the shipper had paid under its construction of the tariff?

If such is the law, then shipping commodities in interstate commerce becomes an extremely dangerous business, and the Act, instead of encouraging commerce, will greatly discourage it.

The Commission, under its power to prescribe the form of tariffs, has made it a rule that no more than one supplement to a tariff is permissible. Could a shipper, who did not know of this

ruling, be held criminally liable for paying a lower rate provided in a third supplement?

Or suppose a tariff reducing a rate were filed without special authority from the Commission, on but ten days notice (the law requiring thirty) and a shipper in good faith paid the lower rate. Could he be sent to jail when the Commission subsequently suspended or annulled the tariff?

An interstate tariff names a rate in cents per ton but does not provide whether it applies to gross tons or to net tons. Could a shipper who honestly paid on a 2240 lb. basis be made a criminal because, unknown to him, the law of the locality made 2000 lbs. a legal ton? What, indeed, would be the legal rate in such a case?

Is a shipper to be charged conclusively with the obligation of correctly solving, under payment of fine or imprisonment, all the difficult questions which arise as between the State and Federal jurisdiction over rates within a State? Suppose for instance a shipper shipping two different commodities between points within a State, rates as to which are prescribed by the State law with severe penalties on shippers and carriers for paying or charging a different rate. Different rates between the same points are prescribed by the tariffs filed with the Interstate Commerce Commission, on one commodity the interstate rate being higher and on the other the intrastate rate being higher. The transportation has such a

relation to interstate traffic as to make it one of the close questions as to which rate is legally applicable. The shipper, it may be, consults the best legal advice obtainable and is advised by the State authorities that the State rate is the proper one in each case. He is also advised by the official in charge of tariffs for the Interstate Commerce Commission that the interstate rate is not applicable.

Is this shipper to be convicted if the Court takes the view that the traffic was interstate?

Consider also the case of demurrage charges on purely intrastate traffic, where the intrastate cars, however, clog the interstate transportation. It is believed to be universally the practice between carriers to charge the State demurrage rates on such cars but it is possible that the law may eventually be announced by the Courts that all demurrage rates are interstate by reason of the inter-relation of the traffic—State and interstate. In many instances the demurrage rates under interstate and intrastate tariffs differ, so that under the intrastate tariff the charge may be higher for the first few days, after which the interstate tariff rate increases so as to make the ultimate charge higher interstate. Must the shipper in every such case pay the highest charge? Even if he did, this might be a violation of the Act since the penalties prescribed are not merely

for paying a lower rate than that prescribed by the tariff but for paying a *different* rate.

Another perplexing problem is found in connection with demurrage tariffs, the terms of which may make them applicable to shipments which are already in transit when the tariff becomes effective. While the rule of law announced by the Commission and the Courts as to freight rates is that a tariff increasing a rate does not apply to a shipment which is started before the rate becomes effective, the contrary rule has been recently laid down as to demurrage tariffs. If, before the decision announcing the latter rule, a shipper and a carrier had in good faith settled on the demurrage charges effective when the shipment was made, could they be penalized because they did not foresee that the Court would hold that a different rule applied to demurrage tariffs from that applicable to transportation tariffs?

The foregoing are merely a few suggestions of the myriads of legal problems which are every day confronting both carrier and shipper, and in the solution of which even the most careful and honest intending citizen is liable to fall into error.

Certainly, if only errors of fact are to excuse the shipper who honestly believes he is observing the tariff, then the Interstate Commerce Act will cease to be, as Justice Peckham has characterized

it, an Act whose purpose it is "to promote and facilitate commerce." (Southern Pacific Co. *vs.* I. C. C., 200 U. S. 536, 552.)

If every shipper on pain of imprisonment is bound to solve correctly every problem of tariff construction which confronts him, and, not only that, but to anticipate every question which may possibly occur to the minds of the Attorney General and his ingenious, assiduous and talented assistants, then, the participation in interstate commerce will indeed become a very perilous undertaking.

In the present case the shipper relied for his belief that what he was doing was in accordance with proper tariff authority, on the responsible officer of the body which this Court held has exclusive jurisdiction of matters of tariff construction.

This Court has held that until the Commission had determined whether or not a tariff applicable to lumber covered cross-ties, the Federal Courts could not entertain suit against a carrier for refusing to accept cross-ties under the lumber rate.

Texas and Pacific Ry. *vs.* American Tie Co., 234 U. S. 138.

In that case at the bottom of page 145 and at the end of sub-division (*c*) on page 148 this Court especially noted that the position of the

railway—that the lumber rate did not include cross-ties—was substantiated by certain correspondence between the railway and the Commission in which the railway had requested the Commission to be allowed to put in effect without notice, the same rate on cross-ties as that on lumber. The correspondence with the Commission relative to the validity of the tariff provision for the allowances on the present case was at least as persuasive as that on which this Court relied as sustaining the contention of the tariff approved by the Commission.

Where the tariff officer of the Commission which has exclusive jurisdiction of the construction of tariffs has ruled that a tariff duly filed gives the shipper authority to persist in a certain practice, can it possibly be held that the shipper is guilty of "knowingly" disregarding the tariff in continuing such practice?

U. S. vs. Northern Pacific Railway Co.

The recent case of U. S. *vs.* Northern Pacific Railway Company, 242 U. S. 190, was a civil proceeding to recover $500 from the railroad for failing to report, as required by an order of the Interstate Commerce Commission, the names of five employees who had been on duty for more than 16 hours in violation of the Hours of Service Act.

These men had reported for duty at 8.10 P. M. but had then been told that they would not be needed until 10.35. In the meantime, however, they had kept the fire alive in the engine. After going on duty at 10.35 their train was delayed in transit so that they worked until 1.15 P. M. the next day—14 hours 40 minutes from 10.35, but 17 hours 5 minutes from 8.10.

A prior suit by the United States for the forfeitures under the Hours of Service Act and the payment by the Railroad of the judgment therein obtained had made it *res adjudicata* that the men had in fact been "on duty" from 8.10, and not from 10.35, as the officials of the Railroad had supposed when they made the report.

The present suit came up on a judgment entered on the pleadings, from which it appeared that the officials of the railroad who had made the report had had before them all the facts which subsequently led the District Court to direct a judgment for the Government. They had honestly believed, however, that the men had been "on duty" only from 10.35 and so failed to include their names in their next monthly report. The report having been on file for 289 days, the possible penalty was $28,900, but the Government sued for only $500, on account of the first five days that the report had been on file.

The District Court entered judgment for the

United States, but this was reversed by the Circuit Court of Appeals, the latter Court holding that although, as contended by the Government, the omission of the names from the report was the result merely of a **mistake of law,** as distinguished from a mistake of fact, nevertheless, the mistake being an honest one, in a genuinely doubtful case, there was no violation of the law.

In the course of the opinion Judge Sanborn said (213 Fed. 162):—

> * * * "in support of that conclusion (that of the District Court) counsel for the Government contend that the mistake of the Company here was a **mistake of law, and not of fact** and for the purposes of this discussion and decision this contention may be admitted to be sound."
>
> * * * * * *
>
> "And the conclusion is that an omission by a carrier from the periodical report of the instances of excessive service of its employes made and filed in good faith within the time prescribed therefor by the Interstate Commerce Commission under the amendment of section 20 of the act to regulate commerce (36 Stat. 556), of one or more instances that should have been included therein, or **any mistake of law or fact therein made in good faith,** does not subject the carrier to liability for the penalties or forfeitures denounced

by that amendment for the failure to file a periodical report.

"The judgment below must therefore be reversed."

When the case came to this Court on certiorari, it was argued both by Mr. Davis and by Assistant Attorney General Underwood, that the defendant's mistake was merely one of law and that *ignorantia legis nemo excusat.*

This Court, however, affirmed the judgment of the Circuit Court of Appeals, Mr. Justice Clarke saying in the course of the opinion:—

> "There are, to be sure, many statutes which punish violation of their requirements regardless of the intent of the persons violating them, but innocent mistakes, made in reporting facts, where the circumstances are such that candid minded men may well differ in their conclusions with respect to them, should not be punished by exacting penalties, except where the express letter of the statute so requires, and we conclude that the section under discussion contains no such requirement. In reports in which a mistake is much more likely to prove harmful than in such a report as we have here, the national banking laws punish mistakes only where 'knowingly' made.
>
> "It is argued that if good faith will excuse an omission or a mistaken statement in this

report, it will be widely taken advantage of as a cover for making false and fraudulent statements in such reports in the future. Such a prospect seems quite groundless, since many, if not most, criminal laws imposing penalties are made applicable only in cases where corrupt intent or purpose is established to the satisfaction of a court or jury, yet such requirement has not been found in practice to be an encouragement to wrongdoing.

"The fact that the Government sues for only one-fifty-seventh part of the forfeitures which had accrued under the construction of the rule and statute contended for by it, should make us slow to attribute to Congress a purpose to exact what is thus admitted to be a punishment greatly disproportionate to the offense. Statutes should be construed, as far as possible, so that those subject to their control may, by reference to their terms, ascertain the measure of their duty and obligation, rather than that such measure should be dependent upon the discretion of executive officers, to the end that ours may continue to be a Government of written laws rather than one of official grace.

"It being very clear that it is not the purpose of the law under discussion to punish honest mistakes, made in a genuinely doubtful case, the decision of the Circuit Court of Appeals is affirmed."

As heretofore observed, judgment in that case had been entered on the pleadings, it being admitted, as alleged in defendant's answer, that the omission of the five names from the report was "due to the fact that this defendant did not consider or understand that the instances referred to * * * were in fact violations of the statute or that it was necessary or required that the same should be included in said report."

If the good faith of the defendant had been in dispute, there can be no doubt that under this decision the question must have been left to the jury in spite of the fact that their honest belief was the result of a mistake of law,—a misinterpretation of the legal meaning of the words "on duty."

Here, it is submitted, was a clear case of an error of law. The reporting officials knew what the law prescribed and knew the facts of the case. They honestly believed, however, in a genuinely doubtful case, that these men had not been on duty for more than 16 hours in the sense prescribed by the Act.

The opinion of Mr. Justice Clarke does not discuss the Armour case, although, as disclosed by the briefs, that case was strongly relied on by the Government.

The distinction, however, is obvious. In the Armour case the defendant knew and understood the meaning of the Act. He knew that he was

doing what the Act forbade him to do, paying a different rate than that prescribed by the tariff. He believed, however, that by reason of a condition which he himself had recently brought about —the making of a contract a few days before—he had a right to disregard the law and the tariff. He honestly believed—as he contended—that, after the law was in effect, he could so arrange matters that he would not be subject to its provisions.

In the Northern Pacific case, however, as in the case at bar, the defendants made a mistake, not as to whether they were bound to obey the law, but as to what the law meant.

They had no doubt but that they were bound to do what the law required, but they believed that they were in fact doing it. They honestly believed, in a case so "genuinely doubtful" that the expert of the Commission made the same mistake, that the note in the tariff stating that the allowance was made out of the rate, in accordance with the long-standing and fixed practice, was a proper compliance with the Act and justified its continuance.

We cannot better close this argument than by a quotation from the opinions of three distinguished Federal judges.

In United States *vs.* Lehigh Valley R. Co., 222

Fed. 685, a civil suit involving the question of whether commissions to forwarding agents were rebates, Judge Hough drew the following distinction between the rules of construction applicable to civil and to criminal cases:—

> "This conclusion has not been reached without due consideration of the charge to the jury of the late Judge Martin in the case of United States *vs.* Sheldon. From the charge alone (which is all I have before me) I should hesitate to think that the matter before Judge Martin was put in exactly the same way as is this cause; but even if these very facts were contained in an indictment, instead of a Bill in Equity, Judge Martin's decision (if applicable) would be to me but another illustration of the radical difficulty of attempting to **'govern by indictment' and of securing convictions for statutory violations involving no moral turpitude. Even judges instinctively 'shy' at branding as a convict any man for failing promptly to square an honest business with new-fangled statutes, and permitting or encouraging juries to find that criminal intent which is still a prerequisite for conviction under such circumstances.**"

Montpelier & W. R. Co. *vs.* U. S., 187 Fed. 271, was an indictment under the Interstate Commerce Act against a railroad company, which for the purpose of this case was really a shipper, for

obtaining by means of false billing transportation of its coal by other carriers at less than the legal tariff rate. It appeared that the difficulty arose from a tariff which was ambiguous. The Court below convicted the defendant and it was fined $1000.

The Circuit Court of Appeals for the Second Circuit reversed the case on the ground that the defendant's act had been the result of an honest mistake. Judge Coxe closed the opinion with the following very significant language:—

"The most favorable view for the plaintiff which can be taken is that the question is involved in doubt. **It must be remembered that this is a criminal prosecution and no man should be convicted of a crime for giving to a doubtful document an interpretation which an intelligent and honest man might easily adopt.**

"The judgment is reversed."

Finally in Atchison, T. & S. F. R. Co. *vs.* U. S., 170 Fed. 250, 255, Judge Ross, speaking for the Circuit Court of Appeals for the Ninth Circuit and quoting from the opinion of Judge Gray of the Third Circuit, said:—

> "The indictment does not charge, nor in the record is it anywhere contended, that there was in the first place any agreement or understanding of any nature that the defendant

should carry the lime at any departure or concession from the established rate; and, while it is entirely true that it was the purpose of the statutory enactments upon the subject to cut up by the roots the entire system of rebates and discriminations, however made, by railroad companies in favor of particular localities, special enterprises, favored corporations, or individuals, and that the Courts should be astute to discover and severely punish any and every such unlawful and wicked act, it was not, we think, the purpose of Congress to punish as a crime any innocent act committed by a corporation any more than by an individual. * * *

"While 'Courts rightly are keen to penetrate an innocent appearing device to reach an illegal transaction,' said the Circuit Court of Appeals for the Seventh Circuit in a case involving an alleged criminal violation of the Elkins Act, 'they should also be alert to save a lawful act, though it be hid under a false cover.' Chicago & A. Ry. Co. *vs.* United States, 156 Fed. 558, 560, 84 C. C. A. 324. And in the case of Camden Iron Works *vs.* United States, 158 Fed. 561, 564, 85 C. C. A. 585, which was also based on the Elkins Act, the Circuit Court of Appeals for the Third Circuit said:—

'It is pertinent to remark that the legislation which has been under examination is highly penal in its character, and while it is the duty of the Courts to so construe its

terms as to suppress, if possible, the mischief against which it is directed, it is no less their duty to see to it that no person, natural or artificial, shall be held guilty of a crime upon an interpretation of the statute creating it which does not appear with at least a reasonable degree of certainty to be the correct one.'"

It is respectfully submitted that the District Court made a fundamental error in refusing to leave to the jury the question as to whether or not the defendant, in accepting the allowances, did so in knowing disregard of its obligation to observe the tariff, or under the honest belief that what it was doing was properly provided for by the note in the tariff.

It is further respectfully submitted that the two questions propounded by the Circuit Court of Appeals be answered in the affirmative.

HENRY S. DRINKER, JR.,
ABRAHAM M. BEITLER,
750 Bullitt Building,
Philadelphia, Penna.
For the Lehigh Coal and Navigation Company.

WM. JAY TURNER,
Lafayette Building,
Philadelphia, Penna.
Of Counsel.

CERTIFICATE BY THE CIRCUIT COURT OF APPEALS.

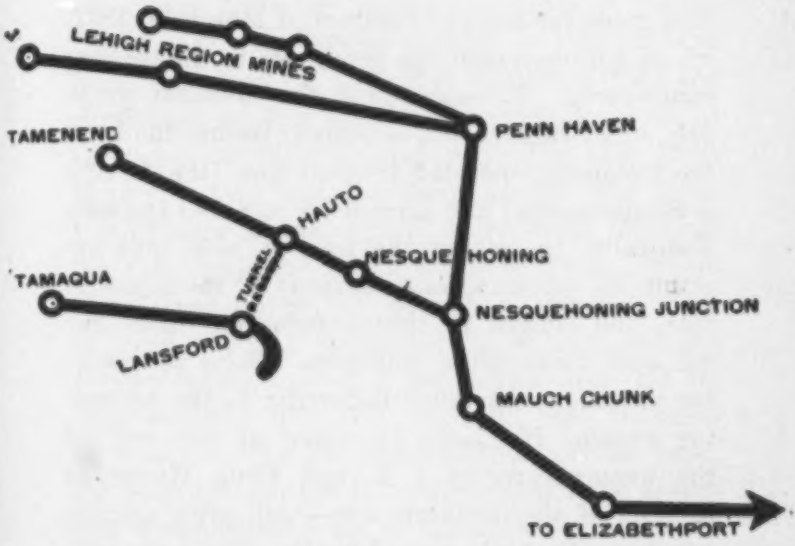
The Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court on certain questions of law, and hereby certifies that the facts upon which they arise are these:—

The foundation of the dispute is the 10th covenant of a railroad lease, or contract, between the Lehigh Coal & Navigation Co. as lessor (hereinafter called the Company), and the Central Railroad of New Jersey as lessee, (hereinafter called the Central Railroad). In order to understand the situation, a preliminary statement in some detail is necessary: The Company, which is a miner and shipper of anthracite coal, was indicted, convicted, and fined, in the District Court for the District of New Jersey for accepting rebates and concessions from the Central Railroad in violation of the Elkins Act as amended in 1906; 38 Stat. 584. Each count of the indictment charged a separate offense substantially as follows: As a part of its interstate business, the Central Railroad carries anthracite coal in carload lots. Being subject to the Acts to Regulate Commerce, it filed tariffs and schedules with the

Commission, showing its rates and charges for such carriage from the Pennsylvania field to points in New Jersey. During the period covered by the indictment—1912, 1913, 1914, and part of 1915—these tariffs were in force, and under them the Company shipped the carload described in the count from Nesquehoning Colliery in Pennsylvania to a specified point in New Jersey. The rate named in the tariff thus became due and payable, but afterward the Company unlawfully and knowingly accepted a portion of such rate from the Central Railroad, so that the coal was carried at less than the rate, and the Company thus received the advantage of an illegal rebate. The indictment did not charge discrimination. The Company pleaded not guilty, and the case went to trial. The following facts appeared without dispute:

In March, 1871, the Company owned and operated the Lehigh & Susquehanna Railroad, (not a separate corporation), a line running up the Lehigh river from Easton to Wilkes-Barre. The Company itself had built and was operating this line under special legislative authority giving it the powers of a common carrier thereon. It also owned the stock and was the lessee of the Nesquehoning Valley Railroad, a separate corporation, whose line ran from Nesquehoning Junction (a short distance above Mauch Chunk) west-

ward to Tamanend. About half way along this road is Hauto, and at this point a tunnel was being built in 1871 to connect at Lansford with the tracks in the Panther Creek valley south of Nesquehoning. These tracks belonged to the Company, and their principal, if not their only, purpose was to serve its mines in that valley. Between Hauto and the Junction was the Company's Nesquehoning colliery, connected with the Nesquehoning railroad. These mines—at Nesquehoning and in the Panther valley—were and still are the nearest mines to New York bay, and they were the only mines at Nesquehoning or in the neighborhood of Hauto. Farther north in the Lehigh region were mines of other operators, and these were more distant from tide by, say, 10 to 40 miles. These other mines were reached by lateral roads that connected with the Lehigh and Susquehanna line at Penn Haven, several miles north of Mauch Chunk. At Penn Haven these lateral roads had an additional connection—with the Lehigh Valley Railroad, a separate carrier. The accompanying sketch will make the topography more plain.



(We also append a map containing further details.)

In March, 1871, the Company faced the following situation: Its prosperity depended in large measure on the revenue from its Lehigh and Susquehanna line, and this revenue in turn depended on the thru connections of the line at Easton on the Delaware river, the southern terminus. The value of these thru connections was threatened by certain arrangements among the connecting carriers, and mainly for this reason the Company's management decided to lease its railroad properties to one of the connecting carriers, namely, the Central Railroad. Accordingly

they made the lease or contract of March 31, 1871, whose 10th covenant has given rise to the present controversy. To understand the covenant properly, other facts should be stated: Before the lease the Company operated its own line (the Lehigh & Susquehanna) and carried its own coal thereon. Naturally, in leasing the line, it took into account the advantageous nearness of its mines to tide, and sought to insure favorable rates for the coal from these collieries. More precisely, the situation was this: Referring to the preceding sketch; if Hauto be taken as the end of the western arm of a Y, and Penn Haven as the end of the northern arm—both arms springing from Nesquehoning Junction—the arms will be found of nearly equal length; so that Hauto and Penn Haven are similarly placed for shipments to tide, each being 118 miles from the Bay—Nesquehoning colliery being a few miles nearer.

At that time, rates were calculated from Penn Haven as a base, or from Mauch Chunk as another base. The mines of the other operators that lay northward in the Lehigh region paid three rates, (1), a local or lateral charge to Penn Haven, (2), a charge from that point to Mauch Chunk, and (3), a charge from Mauch Chunk to tide. The charge from Penn Haven to Mauch Chunk had always been the same as

the charge from the Company's mines to Mauch Chunk. But the lateral charges to Penn Haven from the mines of the other operators that lay northward of that point had varied from 28 to 72 cents, according to distance. The rate from Hauto to tide was the same as the rate from Penn Haven to tide—this of course being less than the rate from the mines north of Penn Haven, since these mines had to pay a lateral charge to Penn Haven. Nesquehoning colliery had the further advantage of a few miles over Hauto. This situation the 10th covenant was intended to preserve. As one consideration of the lease, the covenant put the Company's coal from Hauto and Nesquehoning on a different footing from the coal of the other Lehigh miners in the north, because the other miners were obliged to get their coal to Penn Haven and to pay the local or lateral rate to that point. The covenant provides, that—

> "* * * on coal delivered for transportation by (the Company) on sidings at the northern end of the Nesquehoning tunnel, the rates of transportation shall not exceed the rates charged at the same time from Penn Haven to the same points on coal from the Lehigh region, either by the (Central Railroad) or by the Lehigh Valley Railroad Company."

About 1878, the method of fixing rates was changed. Penn Haven and Mauch Chunk were no longer used as basing points, and the same rates were fixed for all the mines in the Lehigh region. But, in pursuance of the 10th covenant, the rate to be charged the Company was fixed at 86 per cent. of the rate charged to the other mines in the Lehigh region—the reason being that the distance to tide from Penn Haven, from Hauto, or from Nesquehoning, was 86 per cent. of the average distance from the other mines to the north. While this arrangement was in force, the Company paid a net rate calculated on the basis of 86 per cent. After 1887, the date of the first Act to Regulate Commerce, this method of settlement was changed, and the Company paid, or was charged, the full tariff rate charged to the other Lehigh mines, but was repaid, or was credited with, 14 per cent. thereof—this being done under the obligation, or the supposed obligation, of the 10th covenant. Between 1887 and August, 1906, when the Hepburn Act went into effect, this arrangement for repayment did not appear in the tariffs filed by the Central Railroad with the Commission. But in August, 1906, and thereafter, the tariffs contained a foot-note in the following form:

"(4) In compliance with the Tenth Covenant of the lease from the Lehigh Coal &

Navigation Company under which the Central Railroad Company of New Jersey operates the Lehigh and Susquehanna Railroad, a lateral allowance is made out of hereinnamed rates to the Lehigh Coal and Navigation Company on all Anthracite coal originating on the latter's tracks in the Panther Creek, Nesquehoning, and Hacklebernie, Districts mined and shipped by it, when coming via the Hauto, Nesquehoning, and Mauch Chunk gateways.

"The Covenant referred to is set forth in the lease of March 31, 1871, and recorded in Deed Book No. 262, Page 480, of Luzerne County, and Deed Book No. 43, Page 339, of Lackawanna County, Pennsylvania."

(See sample tariff appended hereto.)

This foot-note is connected by the numeral (4) with the rate of $1.55 specified in the tariff as the rate from Hauto and Nesquehoning to Elizabethport, N. J.; but the foot-note does not state how much the allowance is, nor does it furnish any mathematical basis for calculating the amount. All the anthracite coal tariffs filed with the Commission by the Central Railroad after 1906 (262 in number) contained this foot-note. The allowance was 19.18 cents per ton, and this was credited in the monthly settlement of the Company's account with the Central Railroad, the credit being the point of the government's attack. The

verdict covers 27 shipments of coal in prepared sizes from Nesquehoning colliery for re-shipment at Elizabethport. The foregoing facts were either proved or stipulated, and it appeared also without dispute that during the years in question the Company's officers were familiar with the contents of the Central Railroad's tariffs, and knew that the allowance was being made and accepted. One of the Company's defenses was that it had not "knowingly" accepted a rebate within the meaning of the Act—its contention being, that the allowance had been accepted in good faith, in the honest belief that the payment was justified by the 10th covenant, and also in the honest belief that the allowance was properly and legally noted and provided for in the filed and published tariffs.

In support of this defense the Company offered evidence that would support the findings—

(1) That, in 1906, at the time the note was made part of the tariffs, the Company's officers were advised by the traffic officials of the Central Railroad, and also by the Railroad's President, by its Vice-President and General Counsel, and by its General Attorney, that the note had been made part of the tariffs in full compliance with the Act of 1906; and were advised also by them that, in view of the note having been made part

of the tariffs, the payment and the receipt of the allowance would comply with the tariff and with the law; That the Company's officers trusted and relied upon the judgment of the officers of the Central Railroad.

(2) That between 1906 and the date of the indictment 262 tariffs, all containing the note, had been filed with and accepted by the Commission.

(3) That in 1908 the Company had been informed by the Central Railroad that the Commission (acting by one of its important officials who was in charge of the subject of tariffs) had specifically approved the form of the tariff containing the note, in spite of the fact that the amount of the allowance had not been specified therein—the Commission having under consideration at the time the question whether the payment and the receipt of the allowance under the tariff and foot-note were proper: That by reason of such information the Company had thereafter honestly believed that the receipt of the allowance was not in violation of the tariff or of the Act, but was in compliance therewith.

(4) That examinations of the Company's books, records, and accounts, were made by the Commission's investigators in 1909, and that by

reason of such examinations the Commission had been informed that the Company had received, and was receiving, the allowance, but did not object either to the form or to the substance of the practice.

The Company's evidence concerning good faith was received under the Government's objection, and the government offered evidence in contradiction thereof. At the close of the trial the court struck out all the evidence on this subject from the record, and refused to submit the question of good faith to the jury, holding that the Company's honest belief that the allowance was permitted by the tariffs and the foot-note thereto could not affect the issue, for the reason that the Company knew the contents of the tariffs, and knew also that the allowance was actually made and received.

The questions of law on which we desire instruction are these:—

1. In the criminal prosecution of a shipper for knowingly accepting transportation at less than the duly established rate by receiving an allowance that was referred to in the tariff, but was not specified in figures therein, has the defendant a right to offer evidence that the allowance was received under the honest belief that it was law-

fully established by the tariff, and under the honest belief that in receiving it he was not disregarding what he believed to be the provisions of the tariff but was complying therewith?

2. Upon the foregoing facts, and in view of the kind and amount of evidence offered upon the subject of good faith, did the district court err in the present case by refusing to submit the question to the jury?

(Signed) JOS. BUFFINGTON,
JOHN B. McPHERSON,
VICTOR B. WOOLLEY,
Circuit Judges.

Endorsed.—No. 2136 Certificate of Questions For Supreme Court Received and Filed June 6, 1917 Saunders Lewis, Jr., Clerk.

No Supplement to this Tariff will be issued except for the purpose of canceling the Tariff.

I. C. C. A. No. 2
Cancels I. C. C. A. No. 1

The Central Railroad Company of New Jerse

LOCAL AND PROPORTIONAL FREIGHT TARIFF

ON

Anthracite Coal, Anthracite Briquettes and Boulets

IN CARLOADS OF NOT LESS THAN 15 GROSS TONS

From Collieries, Washeries and Stations located on

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

TO POINTS ON

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

FOR SHIPMENT BY WATER

AS SHOWN HEREIN

TERMINAL FACILITIES AND DELIVERIES.

The rates named herein apply from and to the tracks, stations or other receiving and delivering points on, and from private sidings connected with lines parties to this tariff, where the particular traffic is usually received or delivered; and also include the use of receiving and delivering facilities at such stations or other receiving and delivering points or private sidings, subject, nevertheless, to such charges (if any) for switching, terminal service, and all other charges, any rules and regulations that may in any wise change, affect or determine any part, or the aggregate of such rates, as well as any privileges or facilities granted or allowed, as are, or shall be, published by any of the lines parties to this tariff and filed with the Interstate Commerce Commission, and any other charges for strictly local service or regulations incident thereto, lawfully on file with the Interstate Commerce Commission.

DEMURRAGE AND CAR SERVICE REGULATIONS.

On cars consigned for delivery at Piers covered by this tariff, demurrage will be computed on the "average plan" Rules for computation of time and other conditions governing the average free time, as given in tariff I. C. C. A. No. 1, or Reissues thereof, will apply.

On cars consigned for delivery at Piers covered by this tariff, but afterward reconsigned for local delivery, when free time is to be loaded by consignor or unloaded by consignee, $1.00 per car per day, or fraction thereof, for delay beyond 48 hours in loading and unloading, will be added to the rates named herein and constitute a part of the total charges to be collected by the carrier on the property, except that Car Service Association or local regulations at shipping point or destination lawfully on file with the Interstate Commerce Commission, shall prevail and govern at such points.

RECONSIGNMENT EN-ROUTE.

Note.—Rates for reconsigning while on tracks of the C. R. R. Co. of N. J. (See I. C. C. A. No. 275, or subsequent issues.

RATES FROM OR TO INTERMEDIATE POINTS.

From any point of origin not named in this tariff, but between any two points of origin named, the commodity rate will be the same as from the next more distant point that is named in this tariff.

By authority of Rule 77 of Interstate Commerce Commission Tariff Circular No. 18-A, this tariff is not made applicable from all intermediate points. Upon reasonable request therefor rates which will not exceed those in effect from more distant points, will, under authority granted by the Interstate Commerce Commission, be established from intermediate point hereunder upon one day's notice to the Commission and to the public.

WEIGHING AND RE-WEIGHING.

Subject to Rules and Regulations governing Weighing and Re-weighing, as published in C. R. R. Co. of N. J. Tariff I. C. C. A. No. 281, or subsequent issues.

ISSUED NEW YORK, MARCH 12, 1914. **EFFECTIVE APRIL 13, 1914.**

ISSUED BY

T. B. KOONS,	E. M. SNYDER,	A. HAMILTON,	W. E. PUGH,
Vice-Pres. & Freight Traffic Mgr., C. R. R. Co. of N. J., New York, N. Y.	Asst. Freight Traffic Manager, C. R. R. Co. of N. J., New York, N. Y.	General Freight Agent, C. R. R. Co. of N. J., New York, N. Y.	Division Freight Agent, C. R. R. Co. of N. J., Mauch Chunk, Pa.

300 Copies 3705 File K-12700 T. B. 5821-87

List of Collieries, Washeries and Stations from which rates apply.
(All located in the State of Pennsylvania.)

gh Region and Central Railroad Co. of New Jersey Tracks, Hauto, Nesquehoning and Mauch Chunk.	
Name of Colliery.	Railroad Station.
lliance	Kaska
eaver Brook	Audenreid
eaver Brook Washery	Audenreid
oleraine	Audenreid
auto	Hauto
oney Brook	Audenreid
aryd	Maryd
auch Chunk	Mauch Chunk
esquehoning	Nesquehoning
ond Creek	Pond Creek
andy Run	Sandy Run
pper Lehigh	Upper Lehigh

WYOMING REGION.	
Name of Colliery.	Railroad Station.
Alden	Alden
Buttonwood	Buttonwood
Empire Washery	Ashley
	Franklin Junction
Hadleigh	Sugar Notch
Hollenback	Wilkes-Barre
Inman	South Wilkes-Barre
Jersey Washery	Ashley
Lee or Melville	Lee
Lee or Melville Washery	Lee
Maxwell's	Ashley
Melville or Lee	Lee
Melville or Lee Washery	Lee
Red Ash	Ashley
Ridgewood	Everhart Branch (West of Miners Mills, Pa.)
South Wilkes-Barre	South Wilkes-Barre
Stanton	Ashley
Sugar Notch	Sugar Notch
Sugar Notch Washery	Sugar Notch
③ South Wilkes-Barre (C. R. R. Co. of N. J.)	South Wilkes-Barre
Wanamie	Wanamie

List of Stations to which Rates Apply and Rates Applicable thereto.

Anthracite Coal consigned to Piers at points shown below for reshipment, will be transported at following rates, hich include shipping charges free on board vessels. Trimming charges will be additional and at rates shown below.

TO	Rates in Cents per Ton of 2,240 Pounds.			
	Prepared Sizes Briquettes and Boulets.	Pea.	Buck No. 1	Buck Nos. 2 and 3 or Smaller Sizes.
lizabethport Pier (Elizabethport) N. J.	155	140	120	110
ort Johnston "	155	140	120	110
ommunipaw Pier (Jersey City) "	160	145	125	115
ort Liberty "	160	145	125	115

Trimming Charges.

The following charges for Trimming will be made by The Central Railroad Company of New Jersey on all vessels or oats taking Anthracite Coal at their Coal Piers, which Charges will be in addition to Rates from Shipping points to aid Piers, viz.:

Elizabethport Coal Piers	Elizabethport, N. J.
Port Liberty Coal Piers	Jersey City, N. J.
Communipaw Coal Piers	Jersey City, N. J.
Port Johnston Coal Piers	Jersey City, N. J.

TYPE OF VESSELS.	CARGO COAL. Rates in Cents per Ton of 2,240 Pounds. (NOTES 1 AND 2.)	
	In Hold.	On Deck.
cows, Lighters, Deck Lighters and other Open Boats and Barges	3	3
Hatch Boats and Hatch Barges, Single Deck	4	3
Sailing Vessels and Steamers, Single Deck	5	3
Sailing Vessels and Steamers, Double Deck and all Vessels not otherwise specified	7	3
	BUNKER COAL. Rates in Cents per Ton of 2,240 Pounds. (SEE NOTES 1 AND 2.)	
Tugs, Steamers, Pilot Boats, Light-house Boats and Tenders	⑦ ⑩	

On Anthracite coal screenings accumulated at Port Johnston, N. J., and Elizabethport Piers, Elizabethport, N. J., account of shipments having passed over said piers and shipped in connection with the C. R. R. Co. of N. J., a charge of fifteen (15) cents per gross ton will be made for picking up, storage, and loading on board of boats or vessels, which charge will be in addition to rate from mines to foregoing piers.

FOR ANY ADDITIONAL LABOR PERFORMED ACCOUNT RE-SCREENING, ACTUAL COST OF SAME LABOR WILL BE CHARGED IN ADDITION TO CHARGE OF FIFTEEN (15) CENTS PER GROSS TON.

EXPLANATION OF REFERENCE MARKS.

①When boats are not shifted for bunkering on both sides, a charge for the additional labor will be made at the rate of 35 cents per man per hour.

②Rates as shown in this tariff from points with prefix ① include delivery of empty and movement of loaded cars by the C. R. R. Co. of N. J. on the tracks of the Lehigh Coal & Navigation Co., and Philadelphia & Reading Railway Company to and from collieries designated.

③Rates as shown in this tariff from C. R. R. Co. of N. J. tracks, South Wilkes-Barre, Pa., include delivery of empty and movement of loaded cars by the C. R. R. Co. of N. J. on the tracks of the D. L. & W. R. R. and D. & H. Co., from collieries in the Plymouth, Pa., district, viz.: Lance, Nottingham, Reynolds, Plymouth (Parish Coal Co.).

④In compliance with the Tenth Covenant of the lease from the Lehigh Coal and Navigation Company under which the Central Railroad Company of New Jersey operates the Lehigh and Susquehanna Railroad, a lateral allowance is made out of herein-named rates to the Lehigh Coal and Navigation Company on all Anthracite Coal originating on the latter's tracks in the Panther Creek, Nesquehoning and Hacklebarnie Districts mined and shipped by it, when coming, via the Hauto, Nesquehoning and Mauch Chunk gateways.

The Covenant referred to is set forth in the lease of March 31, 1871, and recorded in Deed Book No. 262, Page 480 of Luzerne County, and Deed Book, No. 43, Page 339, of Lackawanna County, Pennsylvania.

EXPLANATION OF NOTES.

NOTE 1. Leveling Coal at request of shipper or agent of vessel for separation of Cargo or other special purpose, will be charged for at the rate of 2 cents per ton based on the tonnage loaded at the pier of this company.

NOTE 2. When wheeling is performed an additional charge will be made therefor at the following rates.

Side-wheel Steamers	12 Cents per Ton of 2,240 Pounds.
All other Vessels	15 Cents per Ton of 2,240 Pounds.

MAP

TOO

LARGE

FOR

FILMING

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918. No. 210.

The United States of America

vs.

The Lehigh Coal & Navigation Company, Defendant in the District Court and Plaintiff in Error in the Circuit Court of Appeals.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY TO BRIEF FOR UNITED STATES.

The brief for the United States lays great stress on two questions not discussed in our principal brief and to which it would seem proper to state our specific reply.

The Decision in the Central Railroad Case.

Much reliance is apparently placed on the decision by the Circuit Court of Appeals in the proceedings affirming the judgment against the Central Railroad for giving the same allowances of which the Navigation Company has been convicted of receiving.

Counsel for the Government contend that since the facts must necessarily have been the same, the decision in the one case must be binding in the other.

While the certificate of the three Circuit Judges in the case at bar would appear conclusive that that Court, which itself decided the Central Case, did not regard the question here certified to have been concluded by the decision in that case, it would seem proper to advise this Court of the reason for this.

The question here presented for decision was not raised by counsel for the Central Railroad in the presentation of their case to the Circuit Court of Appeals.

The question there involved, as stated by them to that Court, was as follows:—

Statement of Question Involved.

"Defendant admitted that it had paid to the Lehigh Coal and Navigation Company (hereinafter referred to as the Navigation Company) the amount alleged in each count

> of the indictment to have been the portion of the tariff rate cancelled or remitted. Its contention was that these amounts were paid to the Navigation Company for the use of an instrumentality of transportation furnished by that company. The question involved in this proceeding is whether or not defendant was required to publish the amounts so paid in the tariffs and schedules showing its rates and charges for transportation."

While reference was made by them in their brief to the question of good faith, this was in connection not with any attempt to show that the officials of the Railroad had honestly believed that they were observing the tariff, but that they had in good faith believed that since the allowances were made in pursuance of their contract of lease, they were allowances for the lease of an instrumentality of transportation and need not have been published at all.

Such good faith as was relied on by the Central Railroad, was directed, just as it had been in the Armour case, not to the Tariff but to the Contract.

On the application to this Court for certiorari the sole question sought to be raised was thus stated in the application:—

> "The petitioner contended below that if the jury found that these allowances were made in good faith as part compensation

for the use of an instrumentality of transportation furnished by a shipper, in satisfaction of the obligations imposed by the aforesaid lease, it should be acquitted because they were not rebates but were legal, notwithstanding the amounts thereof were not published in the filed tariffs.

"The Circuit Court of Appeals found it unnecessary to pass upon this contention because it held that as the Lehigh Coal and Navigation Company had leased its railroad for a long term of years prior to making the agreement for the aforesaid allowances, it did not furnish an instrumentality of transportation.

"Your petitioner alleges that this conclusion of the Circuit Court of Appeals was erroneous because since the lessee could have terminated the lease on the breach of the covenant requiring the lessee to charge a certain rate for the transportation of lessor's coal, it in fact had such control over such instrumentality of transportation as enabled it to make the agreement to furnish it for the allowances heretofore mentioned.

"The Circuit Court of Appeals therefore did not pass upon the following important question presented by the proofs: Whether the Interstate Commerce Act as amended by the Hepburn Act requires the amount of allowances made by a railroad company to a shipper for use of an instrumentality of transportation furnished it by the latter to be published in its filed tariffs."

The Nature of the Allowances.

It is urged by counsel for the United States that there was really no ambiguity in the tariff and no possibility of an honest misunderstanding on the part of the Navigation Company. It is hinted, indeed, that the note was purposely misleading since it referred to "lateral allowances" whereas the allowances in question were made not for any services rendered but as a part consideration for the lease of the road. It is further asserted that "in the anthracite regions the term 'lateral allowances' thus employed in the footnote means an allowance for transportation services rendered by the shipper."

All of the above, however, is but an argument to be addressed to the jury.

As a matter of fact it will clearly appear, when the history of the term "lateral allowance" is reviewed, that it was properly applied in the footnote, signifying as it did an allowance in lieu of the lateral rates originally paid by the other mines down to Penn Haven.

That the rejected evidence was sufficient to support a finding by the jury that the defendant honestly misunderstood the tariff is specifically stated by the Circuit Court of Appeals in the certificate. When the case goes back for trial it will be a question for the jury whether or not such misunderstanding was real and honest, or, as

counsel for the United States here contends, a device to evade the Act.

Counsel for the Government contend that the only mistake was a mistake as to the meaning of the Elkins Act, and apparently seek to confuse the provisions of the Elkins Act making it a crime knowingly to receive less than the tariff rate, with the provisions of the other Acts of Congress and the regulations of the Interstate Commerce Commission defining the manner in which rates must be specified by the tariffs.

We agree that it would be no defense to the present indictment to show that the officials of the Navigation Company did not know that the Elkins Act made it a crime knowingly to receive a rate different than that prescribed by the tariff.

If they received a rate different from that which they knew the tariff called for, it would be immaterial whether or not they knew that this was wrong or forbidden by the Elkins Act.

There is, however, a perfectly clear distinction between the realization that the thing one is doing is forbidden and the knowledge that one is doing the thing which is forbidden.

The crime of knowingly receiving stolen goods would not be justified by proof that the defendant did not know that the law forbade this, but it would be by proof that he received the goods under

the honest belief that the recipient had properly acquired title under an unsigned and unattested will, though the latter would be a "mere mistake of law."

The distinction is between moral turpitude and specific intent, and is the same distinction as was referred to in the Armour Case.

Armour misunderstood the Elkins Act in the sense referred to by the Government. Because he had a contract for a rate less than that which he knew was named in the tariff, he did not believe that it was wrong for him to take such less rate. He honestly believed that his contract superseded the Elkins Act.

He knew, however, that he was receiving a rate different from that named in the tariff.

The Navigation Company not only did not know that what it was doing was wrong; it did not know that it was doing the forbidden thing.

If in the Northern Pacific case, relied on in our principal brief, the defense had been merely that the officers of the Company had not known that there was a law making it a crime to fail to report the names of men on duty for more than 16 hours, or had thought that the law read 18 hours, this defense would have been unavailing.

They, like the officers of the Navigation Company, knew of the law which created the crime, but did not realize that the things which they were

doing was the thing that they knew the Act forbade.

Armour (provided his defense was bona fide) was free of moral turpitude or guilty knowledge but had the specific intent to do the thing forbidden,—the receipt of a different rate from that named in the tariff.

The Northern Pacific Company and the Navigation Company, however, had neither guilty knowledge nor specific intent.

Not only were they unaware that what they were doing was wrong, but, in addition, they honestly believed that they were not doing the thing which they knew the Act forbade.

The one believed that the men whose names were omitted had not in fact been "on duty"—a mistake in the construction of the Statute; the other believed that the receipt of the allowances was not in disregard of the terms of the tariff but in compliance with it.

The distinction is between guilty knowledge and specific intent.

A final analysis of the Government's position apparently resolves it into this:—

If in filing the tariffs the Central Railroad had made no reference whatever to the allowances, but if in spite of this omission the tariff officer of the railroad had told the Navigation Company that the tariffs properly specified the allowances and

the officers of the Navigation Company, without looking to see if this were so, had received the allowances in reliance on this incorrect information, the question of their good faith must have been left to the jury. The mistake would here have been a clear mistake of fact.

Where, however, the Railroad did in fact refer to the allowances in the filed tariffs, but without stating their amount in dollars and cents, and informed the Navigation Company that this method of specifying the allowances had the approval not only of their own experts and counsel but also of the Interstate Commerce Commission, the Navigation Company's good faith in relying on this advice and information was immaterial and it was conclusively presumed to have knowingly violated the law because it in fact looked at the tariff and saw that the allowances were referred to therein in exactly the way that the railroad official had said that they were and in the exact manner that had been approved by the Commission.

It is inconceivable that the word "knowingly," in a criminal statute, could be given any such effect.

The crime for which the Navigation Company is indicted was "knowingly" to accept a rate different from that named in the tariff.

The rate named in the tariff was not $1.55, but $1.55 less an unspecified allowance.

To be guilty of the crime charged, the Navigation Company must have known that it was receiving a rate different from that named in the tariff.

It did not know this, but honestly believed it was doing only what the tariff properly provided for.

It cannot, therefore, be guilty of knowingly disregarding the tariff.

HENRY S. DRINKER, JR.,
ABRAHAM M. BEITLER,
For The Lehigh Coal & Navigation Company.

WM. JAY TURNER,
Of Counsel.

CONTENTS.

	Page.
STATEMENT OF CASE	1–8
ARGUMENT:	9–14
THE ALLEGED MISTAKE OF LAW WAS IRRELEVANT TO THE QUESTION WHETHER THE STATUTE WAS VIOLATED BY THE SHIPPER—	
I. The same alleged mistake was held irrelevant to the question whether the statute was violated by the carrier	9
II. The prior decision against the carrier is authoritative in this case against the shipper	9–11
III. The word "knowingly" in the act does not make knowledge of law an element of the offense	11–12
IV. The argument in defendant's brief is not applicable to the facts of this case	12–14
SUMMARY AND CONCLUSION	15

108815—19—1

CASES CITED.

	Page.
Armour v. *United States*, 209 U. S. 56	10, 11, 12
C. & A. R. R. Co. v. *Kirby*, 225 U. S. 155	13
C. St. P. M. & O. Railway Co. v. *United States*, 162 Fed. 835	10, 11
Kansas Southern Railway v. *Carl*, 227 U. S. 639	13
Central Railroad Co. of N. J. v. *United States*, 229 Fed. 501; 241 U. S. 658	3, 5, 7, 9, 11
Mitchell Coal Co. v. *Pennsylvania R. R. Co.*, 230 U. S. 247	5
Pennsylvania R. R. Co. v. *International Coal Co.*, 230 U. S. 184	13
Standard Oil Co. v. *United States*, 164 Fed. 376	13
United States v. *Northern Pacific Ry. Co.*, 242 U. S. 190	13

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 210.

LEHIGH COAL & NAVIGATION COMPANY

v.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a certificate of questions from the Circuit Court of Appeals for the Third Circuit in a prosecution of a shipper, the Lehigh Coal & Navigation Company, under the Elkins Act (38 Stat. 584). The questions are as follows (ctf. 5, 6):

> 1. In the criminal prosecution of a shipper for knowingly accepting transportation at less than the duly established rate by receiving an allowance that was referred to in the tariff but was not specified in figures therein, has the defendant a right to offer evidence that the allowance was received under the honest

belief that it was lawfully established by the tariff, and under the honest belief that in receiving it he was not disregarding what he believed to be the provisions of the tariff but was complying therewith?

2. Upon the foregoing facts, and in view of the kind and amount of evidence offered upon the subject of good faith, did the district court err in the present case by refusing to submit the question to the jury?

All rebates and concessions which reduce duly established freight rates are prohibited by the Elkins Act in the following terms:

> * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall *by any device whatever* be transported at a less rate than that named in the tariffs published and filed by such carrier * * *. [Italics ours.]

and the act thus declares it a misdemeanor to *accept* the prohibited rebates or concessions *knowingly:*

> Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor * * *.

The evidence showed that the tariffs of the Central Railroad Company of New Jersey published a uniform "group" or "blanket" rate on anthracite coal to tidewater from the entire Lehigh region, including *Nesquehoning*, where defendant was engaged in mining and shipping such coal. (Ctf. 9, 10.) Formal charges at that rate were made against defendant's shipments to tidewater, but were offset in monthly settlements by credits ("allowances") of fourteen per cent, and defendant paid only the remaining eighty-six per cent. (Ctf. 4.) Defendant's officers knew all the terms of the tariff and all the pertinent facts. (Ctf. 4.)

Being found guilty by the jury, defendant took the case on writ of error to the Court of Appeals. That court had previously determined in affirming the conviction of the *carrier* in *Central Railroad Company of New Jersey* v. *United States* (229 Fed. 501; certiorari denied, 241 U. S. 658) that under this identical tidewater tariff the Lehigh region rate was in force against this defendant's shipments and that the "allowances" out of that rate were *prohibited rebates*. On those points the present certificate raises no question.

The question as to the present case which is raised by the certificate is whether the trial court was right in excluding from the consideration of the jury an attempt on the part of defendant to show that the prohibited rebates were not "knowingly" accepted, by testimony to the effect that

defendant's officers believed it *lawful* to accept the "allowances" under this tidewater tariff.

It is important to note that there was no testimony whatsoever that the meaning of any provision of the *tariff* was misunderstood. The perfectly plain meaning of the tariff was that the Lehigh region rate was in force from Nesquehoning and not only was defendant entirely familiar with the tariff but it knew that rate was *recognized* as in force against its shipments from that point by being formally charged against them. (Supra, 3.)

Specifically, the excluded testimony was that defendant's officers believed the acceptance of the "allowances" would "comply with the tariff and with the law" *by reason of a footnote in the tariff*, because they were so advised by the officers of the carrier and because the Interstate Commerce Commission accepted and filed the tariffs, approved their form, and raised no objection for a time. (Ctf. 5.)

The footnote in the tariff, thus asserted to have been relied on by defendant, was in substance a statement that defendant received "*lateral allowances*," in the following terms (ctf. 4):

> (4) In compliance with the Tenth Covenant of the lease from the Lehigh Coal & Navigation Company under which the Central Railroad Company of New Jersey operates the Lehigh and Susquehanna Railroad, a *lateral allowance* is made out of herein named rates to the Lehigh Coal and Navigation Company on all anthracite coal originating on the latter's tracks in the Panther Creek, Nesquehoning,

> and Hacklebarnie districts, mined and shipped by it, when coming via the Hauto, Nesquehoning, and Mauch Chunk gateways.
>
> The covenant referred to is set forth in the lease of March 31, 1871, and recorded in Deed Book No. 262, page 480, of Luzerne County, and Deed Book No. 43, page 339, of Lackawanna County, Pennsylvania. [Italics ours.]

Disregarding for the moment the reference in the footnote to the lease of 1871, we note that in the anthracite regions the term "lateral allowance" employed in the footnote to describe the 14 per cent credits to defendant means an allowance for *transportation services* rendered by a shipper. (*Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, 252.) As the Court of Appeals held in *Central Railroad Company of New Jersey* v. *United States*, supra, "nothing appears to support" the representation that these "allowances" were for transportation services. (229 Fed. 509.)

Therefore, as the Interstate Commerce Commission found in its report "In the Matter of Rates, Practices, Rules, and Regulations Governing the Transportation of Anthracite Coal," dated July 30, 1915, the footnote was *misleading:*

> The term "lateral allowance" in the carrier's tariffs was and is misleading, for the reason that the allowances were not paid for the purpose of compensating the shipper for any service or for the use of any instrumentality connected with the transportation of its shipments, as defined in section 15 of the Act to Regulate Commerce. (35 I. C. C. 243.)

As a matter of fact, the "allowances" were explained by the following circumstances:

Defendant was the owner in fee of the railroad connecting Nesquehoning with the lines owned by the Central Railroad Company of New Jersey. (Ctf. 1, 2.) In 1871 defendant leased its railroad for 999 years to that railroad company. (Ctf. 3.) The lease provided that defendant should always pay lower rates on its shipments of anthracite coal from Nesquehoning than the rates paid at the same time by the other shippers of anthracite coal in the Lehigh region. (Ctf. 3.)

Ever since 1887, when the Act to Regulate Commerce required the publication of freight rates, the railroad's tariffs had published uniform "group" or "blanket" rates as applicable from the entire Lehigh region and from Nesquehoning, and those rates were formally charged against defendant's shipments, but they were reduced by credits at the times of settlement so that defendant paid only 86 per cent of the rates—the haul from Nesquehoning to tidewater being 86 per cent of the average haul from the other mines in the Lehigh region to tidewater. (Ctf. 4.)

The footnote representing, as we have seen, that "allowances" were paid to defendant for *transportation services* had been published in the tariffs ever since the Hepburn Act of 1906 recognized the payment of "allowances" to shippers for transportation services. (Ctf. 4.)

There is no question but that defendant's testimony that it believed it lawful to accept the "allowances"

because of the footnote in the tariff, received appropriate consideration from the Court when assessing the penalty, in view of defendant's knowledge that the "allowances" were *not* for transportation services, as represented in the footnote, and that they merely reduced the published Lehigh region rate for the benefit of defendant so as to correspond to the shorter haul from Nesquehoning to tidewater as compared with the average haul from the other Lehigh mines to tidewater.

Moreover, the asserted belief that the footnote made the acceptance of the "allowances" lawful would be a *mistake of law*, for, as we have seen, the Court of Appeals decided in the previous case, and does not question in this case, that the "allowances" were prohibited despite the footnote. (Supra, 3.)

We do not think this court will care to review that decision, but nevertheless we state the reasons showing it to be clearly right:

The prohibition in the Elkins Act of rebates which reduce the published rate is in terms *absolute*, as we have seen. (Supra, 2.) However, there is in the Act to Regulate Commerce as amended by the Hepburn Act of 1906, the following provision (emphasized by defendant) for allowances for *transportation services* rendered by a shipper:

> If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable * * * (Comp. Stat. 1918, sec. 8583, par. 8.)

But another provision of the Act to Regulate Commerce requires that all allowances shall be specified in the tariffs:

> * * * nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs * * * (Comp. Stat. 1918, sec. 8569, par. 7.)

whilst the footnote in the tariff did *not* specify the amount of the "allowances" to the defendant. But, wholly apart from the lack of specification, these "allowances" could not be justified upon the theory that they were for transportation services, because they were in fact *not* for such services.

Although the footnote stating that the "allowances" were for transportation services was thus *a mere device to evade the Elkins Act*, and the facts showing this were known to defendant, as the certificate discloses, nevertheless we shall assume in our argument, in view of the form of the questions in the certificate, that defendant could have convinced the jury of its asserted belief that the footnote made its acceptance of the "allowances" lawful. Even so, defendant's *mistake of law* (which we have seen would be all that would be involved in the asserted belief) was properly excluded from the jury as being *irrelevant to the question whether defendant violated the law.*

ARGUMENT.

THE ALLEGED MISTAKE OF LAW WAS IRRELEVANT TO THE QUESTION WHETHER THE STATUTE WAS VIOLATED BY THE SHIPPER.

I.

The same alleged mistake was held irrelevant to the question whether the statute was violated by the carrier.

When the Central Railroad Company of New Jersey was tried (and convicted) on the charge of reducing the published rate by these "allowances" on this defendant's shipments it offered testimony to show that the footnote in the tariff was published because "it desired to fully comply with the law," and that the Interstate Commerce Commission raised no objection to the tariff for a time. (229 Fed. 507, 508.) The Court of Appeals, which has transmitted the present certificate, held that to be irrelevant to the question whether the statute was violated, saying:

> *It only remains to say that no question of the defendant's good faith could arise. We may assume its intention to comply with the law and its effort to ascertain its duty, but we can not relieve it from the consequences of mistake. This subject has been considered and decided by the Supreme Court in Armor v. United States, 209 U. S. 56.* (229 Fed. 509.) [Italics ours.]

II.

The prior decision against the carrier is authoritative in this case against the shipper.

The rejection of the claim of "good faith" concerning the footnote in the tariff, as a defense in the car-

rier's case is authority for following the same course on the same facts in the case of the shipper, because the *principle* thus enforced against the carrier was one previously established by this court as against shippers. In *Armour* v. *United States*, 209 U. S. 56 (on which the decision against the carrier was expressly based) *shippers* were indicted under the Elkins Act for accepting concessions from a published rate. As a defense they asserted that they believed the concessions lawful. This court held that was no defense, saying (p. 86):

> * * * The stipulated facts show that the shippers had knowledge of the rates published and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required. *A mistake of law as to the right to ship under the contract after the change of rate is unavailing upon well settled principles.* [Italics ours.]

The *Armour case* was followed in *C. St. P. M. & O. Railway Co.* v. *United States* (162 Fed. 835). That was an indictment of a railroad for giving concessions by "absorption" of grain elevation charges, not provided for in the tariff. The court stated that the evidence showed that the defendant's officers believed—

> that the absorption by them of the elevation charge in question, in order thereby to secure a share in the over the lakes business, did not constitute a rebate or prohibited concession within the meaning of the Elkins Act. (P. 840.)

The court also mentioned rulings by the Interstate Commerce Commission, relied on by the defendant in that case, as showing that the absorption of the charges was lawful (pp. 840, 841), but concluded, upon the authority of the *Armour case*, that the defense was inadmissible, saying (p. 842):

> *To hold that the belief of an individual concerning the legality of his action should constitute a standard of innocence or guilt would establish an uncertain and dangerous criterion.* [Italics ours.]

III.

The word "knowingly" in the act does not make knowledge of law an element of the offense.

The *Armour case* (supra, 10) and the *C. St. P. M. & O. Ry. case* (supra, 10) arose under the Elkins Act prior to the insertion therein of the word "knowingly" by the Hepburn Act of 1906, and defendant emphasizes that as if it had an important bearing in this case.

But the prosecution in *Central Railroad Company of New Jersey* v. *United States* (supra, 9) was based on the statute with the word "knowingly" inserted, and, as we have seen, the Court of Appeals there held that the asserted belief that the law was complied with, by means of the footnote in the tariff, was irrelevant to the question whether the statute was violated.

The word "knowingly" in the act is evidently to be taken as consistent with established conceptions of

the law. Thus it may exclude responsibility in cases of mistake of *fact;* for instance, a miscalculation of the freight payable, or an error as to the contents or weight of packages shipped. Or it may exclude individual liability in the case of an officer having only partial knowledge of essential facts. So too, conceivably, liability may be excluded in the case of a shipper who made a mistake as to a *tariff* and erroneously thought the rate he paid was published in the tariff.

We see no reason to take the word "knowingly" in the act as referring to a knowledge of *law*, thus excluding responsibility where there was a mistake of law with full knowledge of the facts and of the act done, and thus overriding the established principle that knowledge of the law is presumed.

IV.

The argument in defendant's brief is not applicable to the facts of this case.

Counsel for defendant rest the argument in their brief upon the assumption that defendant misunderstood the meaning of the *tariff*. Thus they assert that the case presents the question which was reserved by this court in the *Armour case* for future consideration, concerning "shippers who pay a rate under the honest belief that it is the lawfully established rate" (209 U. S. 85), treating the quoted words as applying to the case of a shipper who misunderstood the meaning of a tariff.

They argue that a presumption of knowledge and understanding of the tariffs should not be enforced in criminal cases against shippers, and attempt to distinguish the series of civil cases subsequent to the *Armour case*, in which this court held that shippers are presumed to know and understand the tariffs: *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184, 197; *C. & A. Railroad Co.* v. *Kirby*, 225 U. S. 155, 166; *Kansas Southern Railway* v. *Carl*, 227 U. S. 639, 652, 653.

They refer to numerous instances of the hardship which might be involved in enforcing in criminal proceedings a presumption of knowledge and understanding of tariffs against shippers who accepted improper rates because they misunderstood the meaning of the tariffs. They cite *Standard Oil Co.* v. *United States*, 164 Fed. 376, where the Court of Appeals for the Seventh Circuit dissented from the view of the court below that the defendant—

> was bound at its peril first to successfully disentangle the Alton's confused tariff sheets and then correctly to interpret them (164 Fed. 381)

and declared that the question in the case was whether a shipper is responsible—

> even though he does not know at the time that the rate accepted was in fact less than the published rate (p. 381)

and decided against the shipper's responsibility.

They also cite *United States* v. *Northern Pacific Ry. Co.*, 242 U. S. 190, where this court dismissed a suit to enforce a penalty for the omission of a carrier to

report certain instances of employees who had been "on duty" longer than was permitted by an order of the Interstate Commerce Commission under the Hours of Service Act, upon the express ground that the statute was not intended to punish "innocent mistakes made in reporting facts" (p. 194). They assert that the mistake in that case was as to the meaning of the words "on duty" in the order of the commission, thus suggesting an analogy between that mistake and a mistake as to the meaning of a railroad tariff.

The entire argument which we have just noted is irrelevant to the present case because here there was no misunderstanding whatsoever as to the meaning of the tariff. Defendant fully understood, as the certificate shows, the clear meaning of the tariff that the Lehigh region rate was in force from Nesquehoning and that "lateral allowances" were made to defendant. (Supra, 3.)

The sole misunderstanding which the excluded testimony tended to show would consist in supposing that the "allowances" could be justified by the footnote in the tariff and that, as we have seen, would be a misunderstanding of the Elkins Act, not of the tariff. (Supra, 7, 8.)

None of the cases cited in behalf of the defendant is authority for the proposition that a mistake as to the meaning of the Elkins Act is relevant to the question whether the act was violated.

SUMMARY AND CONCLUSION.

As the questions in the certificate were framed, we were called upon in our argument to *assume* that defendant believed the "allowances" lawful because of the footnote in the tariff and to justify the exclusion of that belief as a defense as being *irrelevant* to the question whether the statute was violated.

The certificate shows, however, that the footnote in the tariff was a device to evade the Elkins Act by misrepresentation of the "allowances" and that the essential facts were all known to defendant, so that it appears from the certificate as a whole that there was no sufficient basis for a finding that defendant believed the "allowances" lawful in view of the footnote.

We respectfully submit that the certified questions should be answered in the negative.

ALEXANDER C. KING,
Solicitor General
HENRY S. MITCHELL,
Special Assistant to the Attorney General.

APRIL, 1919.

O